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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 329

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL., APPELLANTS,

vs.

PHIL H. GALLAGHER, INDIVIDUALLY AND AS STATE TREASURER OF THE STATE OF WASHINGTON, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

FILED SEPTEMBER 7, 1938.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 29, 1938.
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[fol. 1] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers; Carl Fischer, Inc., G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, Complainants,

against

OTTO CASE, as State Treasurer of Washington; CLIFF YELLE, as State Auditor of Washington; Ernest N. Hutchinson, as Secretary of the State of Washington; G. W. Hamilton, as Attorney General for the State of Washington; B. Gray Warner, as District Attorney of King County of Washington; Harry H. Johnston, as District Attorney of Pierce County of Washington; Ralph E. Foley, as District Attorney of Spokane County of Washington; A. W. Swanson, as District Attorney of Snohomish County of Washington, H. W. Coval, as District Attorney of Whatcom County of Washington; Smith Troy, as District Attorney of Thurston County of Washington; Paul O. Manley, as District Attorney of Grays Harbor County of Washington; John D. Evans, as District Attorney of Yakima County of Washington; Glenn L. Bean, as District Attorney of Walla Walla County of Washington, Sam M. Driver, as District Attorney of Chelan County of Washington; "John Doe" and "Richard Roe", Defendants

BILL OF COMPLAINT—Filed May 28, 1937

Complainants, suing on behalf of themselves and others similarly situated bring this Bill of Complaint against the aforementioned defendants, and allege as follows:

1. The complainant, American Society of Composers, Authors and Publishers (hereinafter referred to, for brevity's sake as the "Society"), at all times hereinafter mentioned, [fol. 2] was and still is an unincorporated association duly organized and existing under the laws of the State of New

York, and has its principal place of business, in the Borough of Manhattan, City of New York, in the State of New York, in the Southern District of New York. The membership of the Society exceeds 1,000, and is comprised of authors, composers and publishers of musical works; said Society was organized and has been issuing licenses for the public performance for profit of musical compositions copyrighted by its members to users located throughout the United States, including the State of Washington, and said Society has protected the performing rights of musical works copyrighted by said members respectively, against infringement because of the public performance thereof for profit, and continues so to do.

2. Complainant, Gene Buck is President of said Society; because said membership, as is above indicated, is exceedingly numerous and it would be impracticable to join all the members of said Society as parties plaintiff, and as the issues and questions involved here are of common and general interest to all of the members of said Society, the said Society has duly authorized and empowered the said Gene Buck as President thereof to institute and prosecute this suit in its behalf, and this action is accordingly brought by Gene Buck as President, for and on behalf of said Society, as well as in his own individual right.

3. Complainant, Carl Fischer, Inc., is a corporation, duly organized and existing under and by virtue of laws of the State of New York, having its principal place of business in the City of New York in said State; complainant G. Schirmer, Inc., is a corporation, duly organized and existing under and by virtue of the laws of the State of New York, [fol. 3] having its principal place of business in the City of New York in said State; complainant, Irving Berlin, Inc., is a corporation, duly organized and existing under and by virtue of the laws of the State of New York, having its principal place of business in the City of New York in said State; all of said last mentioned complainants have been for upwards of twenty-five years and are presently engaged in the business of publishing musical compositions in the State of New York and elsewhere, and are hereinafter for brevity's sake referred to as "Publishers".

4. Complainant, Gene Buck, for upwards of twenty years has been and now is an author of lyrics of musical compositions; complainant, Deems Taylor for upwards of fifteen

years has been and now is a composer of musical and dramatico-musical works; complainant, Oley Speaks, for upwards of fifteen years has been and now is a composer of musical compositions; complainant, William J. Hill, for upwards of five years has been and now is a composer of musical compositions; complainant, Anne Paul Nevin, is the widow of Ethelbert Nevin, who was for more than twenty years a composer of musical compositions, and who departed this life in 1901; complainant, Ella Herbert Bartlett, is the daughter of Victor Herbert, who was for over twenty years a composer and who departed this life in the year 1924; complainant, Jane Sousa, is the widow of John Philip Sousa, who was for more than thirty years a composer and who departed this life in the year 1932; all of the complainants in this paragraph mentioned are citizens of the United States and all are residents and citizens of the State [fol. 4] of New York, and of the Southern District of New York, with the exception of Buck and Sousa, who are residents of the Eastern District of New York, and Nevin, who is a resident and citizen of the State of Maine.

5. Upon information and belief, the defendant, Otto Case, is the duly elected, appointed, qualified and acting State Treasurer of the State of Washington; the defendant Cliff Yelle, is the duly elected, appointed, qualified and acting State Auditor of said State; the defendant, Ernest N. Hutchinson, is the duly elected, appointed, qualified and acting Secretary of State of said State; the defendant, G. W. Hamilton, is the duly elected, appointed, qualified and acting Attorney General of said State; the defendant, B. Gray Warner, is the duly elected, appointed, qualified and acting District Attorney of the County of King in said State; the defendant, Harry H. Johnston, is the duly elected, appointed, qualified and acting District Attorney of the County of Pierce in said State; the defendant, Ralph E. Foley, is the duly elected, appointed, qualified and acting District Attorney of the County of Spokane in said State; the defendant, A. W. Swanson, is the duly elected, appointed, qualified and acting District Attorney of the County of Snohomish in said State; the defendant H. W. Covalt, is the duly elected, appointed, qualified and acting District Attorney of the County of Whatcom in said State; the defendant, Smith Troy, is the duly elected, appointed, qualified and acting District Attorney of the County of Thurston in said

State; the defendant, Paul O. Manley, is the duly elected, appointed, qualified and acting District Attorney of the County of Grays Harbor in said State; the defendant, John [fol. 5] D. Evans, is the duly elected, appointed, qualified and acting District Attorney of the County of Yakima in said State; the defendant, Glenn L. Bean, is the duly elected, appointed, qualified and acting District Attorney of the County of Walla Walla in said State; the defendant, Sam M. Driver, is the duly elected, appointed, qualified and acting District Attorney of the County of Chelan in said State; the aforesaid defendants designated as "District Attorney" are referred to and designated in Chapter 218 of the Laws of 1937 of the State of Washington as "Prosecuting Attorney"; and the defendants, "John Doe" and "Richard Roe", are the duly elected, appointed, qualified and acting officials of the State of Washington, whose names are at present unknown to complainants, who are also charged with the enforcement of the said Statute hereinafter mentioned as Chapter 218 of the Laws of 1937 of the State of Washington and each of said defendants is a citizen and resident of the State of Washington.

6. The value of the matter in dispute herein between complainants and defendants is in excess of the sum of $3,000.00, exclusive of interest and costs.

7. This action is a suit in equity arising under the Constitution and laws of the United States, as will hereafter more particularly appear. Among other things, this suit is brought to repress and prevent the deprivation under color of a certain Statute of the State of Washington, to wit: Chapter 218 of the Laws of 1937 of that State, of certain rights, privileges and immunities secured to complainants by the Constitution and laws of the United States and the Constitution of the State of Washington, that is, the right [fol. 6] to have and enjoy exclusive rights under certain copyrights respectively granted to them pursuant to Article 1, Section 8 of the Constitution of the United States and the Copyright Act of 1909 as amended (35 Stat. L. 1075-1078 U. S. Code, Title 17) without being deprived thereof without due process of law and without being denied the equal protection of the laws, and to repress and prevent the impairment of obligations of contracts heretofore made by the respective complainants and others similarly situated; to repress and prevent the operation and enforcement of the

aid Statute, Chapter 218 of the Laws of 1937 of Washing-
on, hereinafter referred to as the "State Statute", as an
x post facto law, and to repress and prevent the interfer-
nce by the State of Washington with federal judicial power
nd the privileges of complainants as citizens of the United
tates by denying the complainants the right of access to
te Federal Courts; to repress and prevent a compulsory,
rrevocable grant of special privileges to the users of copy-
ighted music in the State of Washington in violation and
isregard of complainants' rights; to repress and prevent
ne taking of complainants' property without just compen-
ation and for a private purpose; to repress and prevent
ne enforcement of said State Statute as a special law grant-
ng to corporations, associations or individuals a special
rivilege and retroactive in its operation; and this suit,
mong other things, involves the question as to whether or
ot each of the complainants may combine with one or more
ther persons, corporations or associations for the purpose
f licensing the public performance for profit of their
opyrighted musical compositions without the State of
[fol. 7] Washington and without doing any act within the
tate of Washington whether or not complainants in combi-
ation with one or more other persons have the right to
sue by themselves or through any agent, attorney or as-
ociation the right to citizens of the State of Washington
publicly perform for profit musical compositions copy-
ghted and owned by complainants on any basis other than
per piece basis, and whether or not the State of Washing-
can require that such per piece charge must not be in ex-
ss of the charge under any per piece system in operation
States other than Washington where any group perform-
g musical works does business; whether each of the com-
ainants has the right to join with one or more persons in
lecting an agent in Washington for the purpose of de-
cting infringements of the exclusive right of public per-
rmance for profit granted by the United States Copy-
ght Act, and to license such rights on any basis other than
per piece basis; whether or not the State of Washington
rough any agency of said State has the right to arbitrarily
a fee, royalty or price on a per piece basis for the public
rformance for profit of the complainants' compositions;
d whether the State of Washington has the right through
agencies to compel complainants to file within said State
list of musical compositions written, composed, copy-

righted or owned by the complainants; and whether the State of Washington may confiscate the property of the complainants within or without the State of Washington including copyrights of musical compositions owned by complainants; and whether or not the State of Washington may deprive the complainants of rights secured under the Copyright Laws of the United States to restrict certain uses of [fol. 8] their copyrighted works, where they have sold the right to a single use of the copyrighted work and where its sole value is in its use for public performance for profit, and where the complainants have received a consideration therefor, either within or without the State of Washington; whether the State of Washington may fix the legal situs of complainants' copyrighted works within that State; whether the State of Washington may declare the licensing of the right to perform musical compositions for profit to be a commercial commodity; whether the State of Washington may regard the complainants as doing business within and subject to the jurisdiction of said State in the event that complainants issue without the State of Washington a license to perform musical compositions within the State of Washington, or in the event that complainants or their agents should accept any of the privileges of a citizen of Washington, or should personally or through an agent investigate infringements committed in said State; whether the State of Washington has the power and the right to seize complainants' copyrighted works, including the right to sue for infringement in the Federal Court and to seize all of complainants' choses of action and sums due on contracts and licenses, and to escheat them to said State; whether the State of Washington has the right, through its Anti-Monopoly Board, to fix the license fees for the public performance for profit of complainants' musical compositions; whether the said Statute is sufficiently definite to apprise the complainants of the acts for which they may be subjected to the fine and imprisonment therein provided for, and whether or not the defendants, in threatening to enforce the provisions of said Statute against complainants, are not depriving the com- [fol. 9] plainants of their property and their right to liberty without due process of law, and whether they are not denying the complainants the equal protection of the laws, and whether the State of Washington may impose conditions upon the enjoyment of copyright in the United States by the 44,000 members of foreign societies, who have authorized

the Society to grant blanket licenses in the United States on their behalf, which conditions are not embraced in, but are in conflict with existing Treaties, Presidential Proclamations, and the Copyright Act of the United States.

This suit is brought to repress and prevent defendants from proceeding under and by virtue of the provisions of the Statute of the State of Washington, hereinafter referred to, and from illegally and unlawfully threatening complainants and their employees, representatives and agents with fine, arrest, imprisonment, penalty, confiscation and forfeiture under the color of said Statute.

8. The Publishers, in furtherance of their business of publishing musical compositions, acquired from writers and composers the right to publish musical compositions written and composed by such writers and composers, respectively, either by outright purchases of such rights or upon a royalty basis; and in the great majority of cases, complainants acquired from such writers and composers the right to secure copyright in the compositions purchased by Publishers; when such compositions are published by Publishers, two of the best copies thereof are deposited with the Register of Copyrights at Washington, D. C., and the required fee paid [fol. 10] to him with a claim for copyright registration, and said compositions are always registered for copyright with the Register of Copyrights in Washington, D. C., pursuant to the provisions of the Copyright Act of 1909 (hereinafter referred to as the "Copyright Act"), and on each and every one of the compositions published by publishers there appears upon the first page of music at the foot thereof, the copyright notice prescribed by said Copyright Act; that each of the Publishers in the course of its many years of conducting its respective business, has registered many thousands of compositions with the Register of Copyrights, and each has secured for its respective corporation the ownership of the copyright in many thousands of musical compositions; that in the music business or trade the totality of copyrights of a particular publisher is known as its "catalogue"; that the great majority of each Publisher's respective catalogue is likewise copyrighted in foreign countries, as well, and copyright protection is obtained by said publishers for their catalogues in almost every civilized country of the world; that none of the copyrights owned by the complainants has a situs within the State of Washing-

ton; that each publisher's business is extensive, and that the value of the copyrights owned by each publisher is in excess of $1,000,000.00; that it is impossible at any given time to ascertain the names or addresses of the persons who at any time have had an interest in such respective copyrights; old copyrights expire currently and are renewed, sometimes by the publisher and sometimes by the writer and composer, [fol. 11] or such others as may be entitled to renewal under the Copyright Act, and new compositions are constantly being registered; the rights in the copyrights are manifold and are sub-divided as to locality, extent and term; in many cases certain rights are reserved to the author or composer and disposition thereof is not within the control or knowledge of the publisher complainant, and is not ascertainable; that each of the publisher complainants would be compelled to expend a sum in excess of $25,000.00 for payment to investigatous, lawyers, clerical help and other expenses, in an attempt to compile and formulate a list of their respective copyrights containing the data required by said State Statute.

9. Each of the publishers has secured copyright registration in many thousands of musical compositions of which copyrights each of said publishers is respectively the proprietor; said copyrights have been secured in manner similar to that described hereinabove, and with respect to each of said copyrights, the publishers have respectively obtained copyright cards, and all such copyrights are on file in the office of the Register of Copyrights in Washington, D. C., as prescribed by Statute, and copies of such cards are not annexed hereto in order to avoid unduly encumbering this complaint, but reference is made hereto and the same are incorporated herein, and copies of said cards will be produced upon the trial of this case, if necessary.

10. Complainant Gene Buck wrote the lyrics of many musical compositions, for over twenty years last past, and from time to time he entered into contracts with various music publishers, pursuant to which such publishers duly [fol. 12] secured copyright in such respective compositions by publication, deposit and registration of the works, as required by the Copyright Act; said copyrights expire by limitation of time at various dates in the future, and the complainant Buck is advised and verily believes, that he is entitled to secure a renewal of each such copyright for an

dditional period of twenty-eight years, in his own name
nd on his own behalf, in each of said works; in such re-
ewals of copyright, complainant Buck will have all the
ghts that vested in the proprietor of the original copy-
ghts; among such works are the following: "Tulip Time",
Hello Frisco", "Garden of My Dreams", "No Foolin' ",
The Love Boat", "Florida, The Moon and You"; for
ver fifteen years, complainant Buck wrote the words and
rics for the Florenz Ziegfeld Follies, as well as the words
nd lyrics of other musical shows produced with great suc-
ss; Buck's right to collect royalties from his works, as
oremention ed, as well as his right to secure renewals of
pyright therein are worth in excess of $100,000.; that as
nd when renewal rights accrue to said complainant in his
spective copyrighted works, it is and will be impossible
r him to determine and ascertain what licenses, grants
rights in the original work have been made or granted
the proprietor of the copyright for the original term
twenty-eight years in said work, or the locality, extent
duration of such grants or licenses, or the names and
ddresses of such licensees or grantees who have acquired
ghts in said respective works from the proprietor of the
iginal term of copyright.

ol. 13] 11. Complainant Deems Taylor composed the mu-
for two musical compositions entitled "Banks O' Doon"
d "Captain Stratton's Fancy", in 1923, and entered into
contract for the publication of said compositions with
Fischer & Bro., a music publisher; a copy of said con-
act is hereto annexed and marked Exhibit "A"; said
blisher secured copyright of said compositions by publica-
n and deposit of the work, as required by the Copyright
t, in and about the year 1923, and said copyrights expire
limitation of time in the year 1951, and complainant
ylor is advised and verily believes, that he is entitled
secure a renewal of said copyrights for an additional
riod of twenty-eight years in his own name and on his
n behalf; in such renewals of copyright, complainant
ylor will have all the rights that vested in the proprietor
the original copyrights; the complainant Taylor has com-
sed the music for a great many other works, among them
The King's Henchman", "Peter Ibbetson" and "Through
Looking Glass Suite"; "Peter Ibbetson" has been suc-
sfully produced at the Metropolitan Opera House in

the City of New York; Taylor's right to collect royalties from his works, as aforementioned, as well as his right to secure renewals of copyright therein are worth in excess of $100,000.; that as and when renewal rights accrue to said complainant in his respective copyrighted works, it is and will be impossible for him to determine and ascertain what licenses, grants or rights in the original work have been made or granted by the proprietor of the copyright for the original term of twenty-eight years in said work, [fol. 14] or the locality, extent or duration of such grants or licenses, or the names and addresses of such licensees or grantees who have acquired rights in said respective works from the proprietor of the original term of copyright.

12. Complainant Oley Speaks composed the music for many musical compositions and entered into numerous contracts for the publication of said compositions with complainant G. Schirmer, Inc., a music publisher; said publisher secured copyrights in said compositions by publication, deposit and registration of the works, as required by the Copyright Act, and said copyrights will expire by limitation of time at various dates in the future, twenty-eight years from the respective dates of registration of said works; and complainant Speaks is advised and verily believes that he is entitled to secure renewals of said copyrights for an additional period of twenty-eight years respectively, in each one in his own name and on his own behalf; in such renewals of copyright complainant Speaks will have all the rights that vested in the proprietor of the original copyrights; among the works composed by Speaks are the following: "Sylvia", "Road to Mandalay" and "Morning"; Speaks' right to collect royalties from his works, as aforementioned, as well as his right to secure renewals of copyright therein are worth in excess of $100,000; that as and when renewal rights accrue to said complainant in his respective copyrighted works, it is and will be impossible for him to determine and ascertain what licenses, grants or rights in the original work have been made or granted by the proprietor of the copyright for the original [fol. 15] term of twenty-eight years in said work, or the locality extent or duration of such grants or licenses, or the names and addresses of such licensees or grantees who have acquired rights in said respective works from the proprietor of the original term of copyright.

13. Complainant Hill composes music, and he has entered into contracts for the publication of musical compositions composed by him with Shapiro, Bernstein & Co., a music publisher who has secured copyrights of said compositions by publication, deposit and registration of such works, as required by the Copyright Act, and said copyrights expire by limitation of time at various dates in the future, twenty-eight years from the date of registration of such respective works, and the complainant Hill is advised and verily believes that he is entitled to secure renewals of said copyright for an additional period of twenty-eight years in his own name and on his own behalf; in such renewals of copyright complainant Hill will have all the rights that vested in the proprietor of the original copyrights; the complainant Hill has composed the music for a great many works, among them "The Last Roundup", "Chapel in the Moonlight", "The Old Spinning Wheel", "Lights Out", "Wagon Wheels", "Empty Saddles", "The Glory of Love" and "Timber"; Hills' right to collect royalties from his works, as aforementioned, as well as his right to secure renewals of copyright therein are worth in excess of $100,000.; that as and when renewal rights accrue to said complainant in his respective copyrighted works, it is and will be impossible for him to determine and ascertain what licenses, [fol. 16] grants or rights in the original work have been made or granted by the proprietor of the copyright for the original term of twenty-eight years in said work, or the locality, extent or duration of such grants or licenses, or the names and addresses of such licensees or grantees who have acquired rights in said respective works from the proprietor of the original term of copyright.

14. Complainant Anne Paul Nevin is the widow of Ethelbert Nevin, who wrote and composed, among others, the following musical compositions which were duly published and copyrighted: "The Rosary", "Mighty Lak a Rose", "Venetian Suite" and "Narcissus," and she has obtained renewals of some of said compositions in her own name, and is advised and verily believes that she will be entitled under the Copyright Act to obtain renewals of all of such compositions as and when the original terms thereof expire, during her lifetime; Ella Herbert Bartlett is the daughter of Victor Herbert, the foremost composer in America, who wrote and composed, among others, the following works,

all of which were duly registered for copyright: "Kiss Me Again", "Natoma", "Sweet Mystery of Life", "I'm Falling in Love With Someone", "Mlle. Modiste", "Red Mill", "Naughty Marietta", "Irish Fantasy" and "Pan Americana"; she has renewed some of the works on which the original term of copyright has expired, and is advised and believes that she will be entitled to renew the other works as and when they expire; Jane Sousa is the widow of John Phillip Sousa, who wrote and composed a great many compositions, and who was known as the "March King"; among [fol. 17] his compositions are the following: "Stars & Stripes Forever", "Adeste Fidelis", "Washington Post March" and "El Capitan"; said compositions were duly registered for copyright, and said complainant Jane Sousa has renewed some of said compositions, and is advised and believes that she will have the right to renew the other works as and when they expire; that the rights, which the complainants mention in this paragraph have, in the renewal of the works written and composed respectively by the husbands and father of said complainants, are of great value and are worth in excess of $100,000. with respect to each of said complainants.

15. Prior to 1917, none of complainants, nor the respective husbands and father of complainants mentioned in the next preceding paragraph, received any compensation for the public performance for profit of the musical compositions respectively owned, published, copyrighted, written or composed by them; although the copyright Statute gave to the complainants the exclusive right to publicly perform for profit their respective musical compositions, users of musical compositions throughout the country refused to recognize such exclusive rights in complainants, and persistently and stubbornly refused to pay any royalties for such public performance for profit, but, on the contrary, users of music throughout the country publicly performed for profit the musical compositions owned, written and composed by complainants respectively, without payment of any royalties; complainants and others similarly situated were unable to enforce their exclusive rights in the public performance for [fol. 18] profit of their compositions; individually they had no means of enforcing such rights; they could not employ investigators throughout the country to detect infringement because such public performances for profit were fugitive,

fleeting and ephemeral, and no record was made by users of such performances; complainants had no effective means of employing lawyers throughout the United States to bring infringement suits against users for the wrongful public performance for profit of their musical compositions; and complainants and others similarly situated were helpless to enforce the rights granted to them by the Copyright Act; those of the users of music who might be willing or inclined to pay for the public performance for profit of the compositions of complainants and those similarly situated, were unable to do so because it was necessary to have ready access to a great number of musical compositions to be performed in a single evening and at a moment's notice; under such circumstances it was impossible to get in touch with the individual owners of the particular musical compositions, many of whom were scattered throughout the world; the users of music, consisting primarily of hotel owners, innkeepers, cabaret and dance hall proprietors and motion picture exhibitors were organized into very powerful trade associations who employed counsel to defend such users against claims of infringement for the unauthorized performance of public performance of musical works of complainants, and others similarly situated, and such associations of users even offered to defend infringers who were [fol. 19] not members of their respective associations.

16. On February 13, 1914, a small group of composers, authors and publishers, under the leadership of Victor Herbert, Irving Berlin, Silvio Hein, William Jerome, Gustav Kerker, John Golden, Glen McDonough, Ernest R. Ball, Raymond Hubbell, James Weldon Johnson, Louis A. Hirsch, Henry Blossom, George Maxwell, Jay Witmark, the complainant Gene Buck and the complainant publisher Irving Berlin, Inc., and others, organized a voluntary unincorporated non-profit association under the laws of the State of New York, which they designated as the American Society of Composers, Authors and Publishers (hereinafter referred to for brevity's sake as the "Society"); said Society was formed for the purpose of licensing to users of music throughout the country the right to publicly perform for profit the works of its members; said Society did not deal in any commodity, did not deal in any sheet music, exercised no function with respect to mechanical rights of reproduction, and was limited solely as aforesaid to the right of pub-

lic performance for profit; said Society has functioned continuously since said date; from its very commencement it encountered tremendous opposition on the part of organized groups of users of music throughout the country; one of the functions of the Society was to detect infringements of the right of public performance for profit of its members and to institute suits on behalf of its members for such infringements; it also licensed establishments throughout the [fol. 20] country to publicly perform for profit the musical compositions of its members upon fair and reasonable license fees; the organized groups of users of music resisted efforts to compel them to pay compensation for the performance for profit of the Society's members; with the advent of radio broadcasting in 1922, powerful groups of radio broadcasters throughout the United States joined with the other groups, aforementioned, in opposing the Society; such groups of users attacked the Society by interposing defenses in suits for infringement, by complaints made to the Attorney-General of the United States, by a suit brought against the Society in the State of New York, by attempts made annually in Congress for over twelve years last past to amend the Copyright Act so as to permit the users of music to publicly perform for profit the musical compositions of the Society's members without compensation, by initiating tax legislation in various States, and lately by introducing into various States bills similar to the Statute of the State of Washington herein complained of, with a view of destroying and nullifying the rights of the Society's members given to them by the Copyright Act.

17. In 1935 a suit was instituted in the State of Washington, by the defendant herein, G. W. Hamilton, Attorney General for the State of Washington, in the Superior Court of the State of Washington, in and for Thurston County, praying for a dissolution of the Society and for the appointment of a Receiver; the Society presented to said Court a verified petition in which it set forth in detail its organization, method of functioning and the necessities therefor; on [fol. 21] or about June 8, 1936, a decree was made by Honorable D. F. Wright, Judge of said Court, dismissing the complaint upon the merits; a copy of said decree is hereto annexed and marked Exhibit "I".

18. At the present time there are approximately 123 publisher members of the Society; there are approximately 1000

riter and composer members of the Society; from time to me said publisher, writer and composer members have en-red into contracts with the Society, wherein and whereby id members of the Society have assigned to the Society eir respective exclusive right of public performance for rofit in their respective musical compositions for periods five years at a time; the last contracts were signed prior and became operative January 1, 1936; annexed hereto nd made part of this complaint is the contract entered into the 12th day of April, 1935, between complainant arl Fischer, Inc., and the Society and marked Exhibit "B"; nnexed hereto and made part of this complaint is the con-act entered into on the 25th day of June, 1935, between mplainant Gene Buck and the Society and marked Ex-ibit "C"; the other complainants, G. Schirmer, Inc., Irving erlin, Inc., Deems Taylor, Oley Speaks, Anne Paul Nevin, lla Herbert Bartlett and Jane Sousa, prior to January 1, 936, executed and delivered to the Society contracts in orm similar to the contracts entered into between the ociety and Carl Fischer, Inc., and Gene Buck, and that all f said contracts executed and delivered by the complainants the Society expire by limitation of time on the 31st day f December, 1940, all of the publisher members of the ociety have executed contracts similar to Exhibit "B"; fol. 22] all of the other members of the Society have exe-uted contracts similar to Exhibit "C".

19. Annexed hereto and made a part of this complaint and narked Exhibit "D" are the present Articles of Associa-ion of the Society.

20. Complainants' respective businesses and occupations re lawful ones, and the pursuit thereof cannot be prohib-ted directly or indirectly; the rights vested in the complain-nts by the Constitution of the United States and the Copy-ight Laws enacted by the Congress thereunder are exclu-ive and cannot be limited, curtailed, forfeited, confiscated r circumscribed by any of the Statutes of the several States, ncluding the State of Washington.

21. The users of music have uniformly objected to deal-ng with individual copyright owners for the licensing of he public performance for profit of particular musical ompositions; the practice of the Society has been to license heatres according to their seating capacity, radio broad-

casting stations according to their income, power and coverage, and hotels, cabarets and dance halls according to the respective size, business done, number and size of orchestras, methods of performance, income and standing; licenses are granted by the Society to such users in which all the musical compositions owned, written, and composed by members of the Society are made available to such users for use at any time within the contract period without requiring the specific consent of the owner of the particular composition played; such licenses include likewise the right on the part [fol. 23] of the users to publicly perform for profit the musical compositions copyrighted, written and composed by members of societies throughout the world organized on a basis similar to the Society with whom Society has contracts so that by licenses made with the Society the users obtain the right to publicly perform for profit the works of over 44,000 composers, authors and publishers; said rights granted by the Society are of great value to the users who have consistently and uniformly objected to the separate licensing of individual compositions, on the ground that it would involve a great amount of bookkeeping, clerical hire and expense; the system of blanket licenses conferred by the Society performs a useful service for the users and enables them to have available at all times for their own special purposes a vast reservoir of musical compositions that are pleasing and entertaining to the public, classical, modern, as well as popular; and the Society since 1914 has looked after the interests not only of its own members, but of other members of the musical profession who have been in distress by reason of age and indigence and who otherwise have been unable to support themselves, and the Society has paid sick benefits to such individuals, as well as to its members, and has looked after the widows and orphans of indigent composers and writers throughout the United States whose families would otherwise have been objects of public charity; the individual complainants herein have neither the resources, funds, organization or ability to protect the musical copyrighted works in which they are authors and composers, or which they own, or in which they have renewal rights, or obtain renewals, against infringement [fol. 24] by unauthorized performances for profit within the State of Washington in their individual capacity, and have been compelled, as aforesaid, to unite and combine for

the purpose of preventing such infringement and enforcing the rights granted to them under the Copyright Acts, and such Acts cannot be enforced by said individual complainants without such combination; that if the individual complainants were to create an agency within the State of Washington to protect against infringement of their respective musical copyrights by unauthorized public performances for profit and to issue licenses thereunder to users in the State of Washington and check up on the accuracy of uses reported, the cost thereof to each of such individual complainants would be greatly in excess of $10,000 a piece, which expenditure would be necessary in the employment of investigators, clerical help, accountants and lawyers.

22. Upon information and belief the State Statute was sponsored by an organized group of radio broadcasters and other users of music in an endeavor to destroy the Society so that they might have for their own selfish aggrandizement free access to all musical compositions without compensation; said group of users caused a similar bill to be introduced in the legislature of the State of Montana in or about February, 1937, which has been enacted as a law and is known as Chapter 90 of the Laws of 1937 of the State of Montana; and similar bills have been prepared by such group of users who have circularized the legislatures of other States with a view to presenting to them for enactment similar statutes in all the forty-eight States; said State [fol. 25] Statute was passed by the legislature of the State of Washington (as was the similar bill passed by the legislature of the State of Montana) without an opportunity for a hearing being afforded to complainants and others similarly situated. The following radio broadcasting stations in the State of Washington are members of the National Association of Broadcasters, and as such members, for many years last past, act and presently act collectively in dealing with the Society, as well as for other purposes:

Station	Owner	Location
KFPY	Symons Broadcasting Co.	Spokane
KHQ	Louis Wasmer, Inc.	Spokane
KIRO	Queen City Broadcasting Co.	Seattle
KIT	Carl E. Haymond	Yakima
KJR	National Broadcasting Co., Inc.	Seattle
	Fisher's Blend Station, Inc. (lessee)	
KMO	KMO, Inc.	Tacoma

Station	Owner	Location
KOL	Seattle Broadcasting Co., Inc.	Seattle
KOMO	Fisher's Blend Station, Inc.	Seattle
KPQ	Wescoast Broadcasting Co.	Wenatchee
KRSC	Radio Sales Corporation	Seattle
KRKO	Lee E. Mudgett	Everett
KVI	Puget Sound Broadcasting Co., Inc.	Tacoma
KVOS	KVOS, Inc.	Bellingham
KXA	American Radio Telephone Co.	Seattle
KXRO	KXRO, Inc.	Aberdeen

23. Annexed hereto and made a part of this complaint is a copy of the State Statute marked Exhibit "E".

24. Upon information and belief, the Society pursuant to [fol. 26] the rights vested in it by the contracts made with complainants herein, and others similarly situated, has for many years entered into numerous contracts which are now in force between it and users of music within the State of Washington, in which the Society has licensed such users to publicly perform for profit the musical compositions of its members; there are about 528 contracts in force at the present time from which the Society received for the year 1936 the sum of $60,530.68; on or about the 23rd day of June, 1936, the Society entered into a contract with K. M. O. Inc., proprietor of a radio broadcasting station having call letters KMO, a copy of which is hereto annexed and made a part hereof and marked Exhibit "F", which contract is presently in force and effect, and has been duly performed both by the Society and by the radio broadcasting station; in addition to said contract, there are 19 other contracts made between the Society and the radio broadcasters in the State of Washington similar to Exhibit "F" presently in force and presently being performed both by the Society and each respective broadcaster; on or about the 4th day of August, 1936, the Society entered into a contract with D. & R. Theatres Co. Inc., proprietor of a motion picture theatre, known as the D. & R. Theatre, Aberdeen, Washington, a copy of which is hereto annexed and made a part hereof and marked Exhibit "G", which contract is presently in force and effect, and has been duly performed both by the Society and by the motion picture theatre exhibitor; in addition to said contract, there are 227 other contracts made between the Society and the motion picture theatres in the State of Washington similar to Exhibit "G" presently in force and presently being performed both by the Society and each

[fol. 27] respective motion picture theatre exhibitor; on or about the 21st day of July, 1936, the Society entered into a contract with The Olympic Incorporated, proprietor of Olympic Hotel at Seattle, Washington, a copy of which is hereto annexed and made a part hereof and marked Exhibit "H", which contract is presently in force and effect, and has been duly performed both by the Society and by the hotel owner; in addition to said contract, there are 133 other contracts made between the Society and hotels and restaurants in the State of Washington similar to Exhibit "H" presently in force and presently being performed both by the Society and each respective hotel and restaurant proprietor.

25. Societies similar in purpose and scope to the Society have been in existence and are organized and operating under and by virtue of the laws of Argentina, Austria, Belgium, Brazil, Bulgaria, Czecho Slovakia, Denmark, England, Finland, France, Germany, Hungary, Italy, Jugoslavia, Norway, Portugal, Rumania, Spain, Sweden and Switzerland.

By virtue of various treaties and proclamations of the Presidents of the United States, issued pursuant to Section 8 of the Copyright Act, and which are now in force between the United States and Argentina, Austria, Belgium, Brazil, Bulgaria, Czecho Slovakia, Denmark, England, Finland, France, Germany, Hungary, Italy, Jugoslavia, Norway, Portugal, Rumania, Spain, Sweden and Switzerland, reciprocal rights are granted to citizens of the United States and to citizens of the foreign countries named, whereby the citizens of such foreign countries are extended copyright protection within the United States, upon compliance with the Copyright Act with respect to their several musical [fol. 28] compositions, and citizens of the United States are extended reciprocal protection, with respect to their several musical compositions, under the copyright acts of said countries upon complying with the copyright acts thereof. Such reciprocal protection is based upon the determination that [illegible] reciprocal conditions for the enjoyment of copyright exist as between the United States and such respective foreign states or nations, and is accorded under and by virtue of proclamations and treaties establishing the existence of such conditions, and having the force and effect of law.

Under mutual working arrangements with foreign societies, the Society has the exclusive right to and does license

within the United States, the public performance for profit of the musical compositions copyrighted by all the members of said respective foreign societies, and said foreign societies have the exclusive right to, and do license within the territorial limits of their respective countries, the public performance for profit of the musical compositions copyrighted by members of the Society. Under such arrangements between the Society and said foreign societies, the latter are not required to, and never have, filed lists of the respective works copyrighted by their respective members. The catalogues of musical compositions of said foreign societies exceed many hundreds of thousands of compositions composed and written by more than 44,000 members of such foreign societies, the exact number of compositions being utterly impossible to state at any one time on account of the expiration, renewal and obtaining of new copyrights. The right to perform the musical compositions embraced in [fol. 29] said foreign catalogues are included in the blanket licenses issued to individual licensees by the Society in the United States. It is virtually impossible for the Society to obtain the information with respect to foreign copyrights required by Chapter 218 of the Laws of Washington, 1937, and the cost of even attempting to comply with that law would be far in excess of $50,000, and filing of monthly lists of changes would be wholly impracticable, because of expense, distance and the necessity of translations, together with the fact that no arrangements exist with foreign societies providing that such information be furnished. Their 44,000 members are scattered throughout the world, and they are not required to file a complete list of their works in order to enjoy copyright protection in the United States under the Treaties Proclamations and United States Laws aforesaid.

26. Upon information and belief, compliance with said State Statute would require the Society and its licensees to abandon the contracts between them and would compel each of the complainants, as well as other members of the Society similarly situated to rescind their respective contracts with the Society unless they were willing to have their works used for purposes of public performance for profit in Washington on an arbitrary basis upon a per piece system; complainants and others similarly situated are not willing to permit their musical compositions to be performed within

the State of Washington publicly for profit upon a per piece basis or on any basis wherein the fee or compensation would be arbitrarily determined by the State of Washington, or any of its agencies, or by anybody else; complainants believe [fol. 30] that such price-fixing would deprive them of the exclusive rights vouchsafed to them under the Copyright Law; if each complainant would be required to act independently in order to have the right to fix license fees, each complainant would be required to have an investigator covering each of the places of public entertainment and amusement in the State of Washington to determine whether any infringements took place and to determine whether payments were being made in accordance with performances; the establishment of such an agency would cost each of the complainants many thousands of dollars and would in fact greatly exceed the revenue which each of them might hope to collect in the State of Washington; all the users of music in the State of Washington paid for the music of the 44,000 composers represented by the Society and its affiliated societies for the year 1936, the aggregate sum of $60,530.68. In the year 1936, the following counties of the State of Washington paid to the Society for licenses to publicly perform for profit musical compositions of complainants and the other members of the Society and all other Societies throughout the world affiliated with the Society, the following sums:

County	Amount collected
Benton	469.45
Callom	30.00
Chelan	701.00
Clallan	168.52
Clarke	316.13
Columbia	36.20
Cowlitz	62.20
Franklin	45.00
Garfield	40.00
Grand	22.50
Grays Harbor	1,265.68
Island	10.00
Kings	31,669.41
Kitsap	254.15
Kittatas	126.60
Klickitat	30.00

County	Amount collected
Lewis	443.70
Lincoln	15.00
Mason	62.50
Okanogan	123.25
Pend Oreille	49.80
Pierce	4,161.63
Skagit	37.50
Snohomish	661.77
Spokane	16,445.63
Thurston	384.02
Walla Walla	906.29
Wahkiakum	15.00
Whatcom	986.75
Whitman	238.90
Yakima	932.10
Making a total of	$60,530.68

[fol. 31] The proportion collected from each county represents the approximate proportions that were collected from each county for other years prior to 1936, and similar sums will be collected in the same proportion in the future unless prevented by the operation of the said State Statute. The cost to the Society of attempting to compile the lists and information required to be furnished under the State Statute would be far in excess of $300,000., which sum would have to be expended for research work with reference to the past history of each and every copyright owner, by every one of the 44,000 members of the Society and its affiliated societies, lawyers fees for opinions as to the rights of parties involved with respect to the ownership, grants, licenses and other interests in the respective copyrights, clerical help and other incidental expenses; even with such an expenditure, it would be utterly impossible to furnish an accurate or complete list of all the respective copyrights of the members of the Society and of its affiliated societies with all of the data required by the State Statute.

27. Complainants will be able to license users of their music in the State of Washington without doing any act in said State, but unless the injunction prayed for herein is granted, complainants will be unable to issue any licenses

from without the State of Washington without incurring the penalties of said State Statute. The copyrighted works of the complainants and of all the other members of the Society and of the affiliated societies have at one time or another been publicly performed for profit in the State of Washington, and a great number of the copyrighted works of the complainants are being constantly performed in the State [fol. 32] of Washington, and will continue to be performed in the State of Washington.

28. Radio broadcasting stations KOMO and KJR, located in Seattle, Washington, and stations KHQ and KGA, located in Spokane, Washington are affiliated with and rebroadcast programs emanating from the studios of the National Broadcasting Company in New York City, New York. Stations KOL, located in Seattle, Washington, KVI, located in Tacoma, Washington and KFPY, located in Spokane, Washington are affiliated with and rebroadcast programs emanating from the studios of the Columbia Broadcasting System, Inc. The following stations: Stations KXRO in Aberdeen; KXA in Seattle; KFIO in Spokane; KUJ in Walla Walla; KPQ in Wenatchee and KVOS in Bellingham are affiliated with the National Independent Broadcasters, Inc., having its general sales office at 17 East 42nd Street, New York City, and rebroadcast programs emanate- from studios located throughout the United States. It is a general practice with respect to national networks to have musical programs performed in the City of New York and in other large cities and broadcast from the radio station where such program is performed. At the same time the program is transmitted by telephone wires to other stations located throughout the country, and particularly the aforementioned broadcasting stations located within the State of Washington, so that the broadcast originating in the home studio of the National Broadcasting Company or of the Columbia Broadcasting Company or of the National Independent Broadcasters, Inc., as the case may be, is simultaneously performed by means of a broadcast from the connecting stations, includ- [fol. 33] ing the above mentioned stations within the State of Washington; that the programs broadcast by many stations outside of the State of Washington, whether affiliated or not with any station located within the State of Washington are heard within the State of Washington, and such

programs include the broadcasting of music copyrighted by the members of the Society, including the complainants herein; broadcasting stations without the State of Washington broadcast daily in excess of 100 copyrighted works of the complainants and other members of the Society and of its affiliated societies, which broadcasts are heard on receiving sets within the State of Washington.

29. The said State Statute prevents complainants from licensing the broadcasting of their compositions outside of the State of Washington if such broadcast may be heard within the State of Washington; said State Statute deprives complainants of the means of detecting infringements in the State of Washington; said State Statute attempts to deprive complainants of unrestricted access to the Federal Court for redress for infringement of their copyrights; said State Statute sets up a system of recording of copyrights in addition to that provided for by the Copyright Act; unless the enforcement of this State Statute is restrained by this Court, other States may enact similar Statutes requiring complainants to comply not only with the recording requirements enacted in this State, but also in all the forty-eight States, all of which would work undue hardship on complainants and would violate the spirit of the Constitution and the Copyright Laws enacted thereunder.

[fol. 34] 30. Upon information and belief said State Statute is class legislation; it is aimed only at proprietors of musical copyrights and no other copyrights, and in fact it expressly exempts proprietors of other copyrights from the operation of the said State Statute and it exempts the performance of musical works which are not copyrighted under the laws of the United States but which are protected at common law. That a great many forms of copyright and kinds of copyrighted works are presently and constantly dealt in, licensed, sold and otherwise made available within the State of Washington, such as motion pictures, dramas, newspapers, magazines, books and periodicals, none of which are affected by said State Statute.

31. Said State Statute attempts to vest in a receiver the right to seize property without the confines of the State of Washington; and said Act attempts to give the State of Washington power and jurisdiction over complainants, and others similarly situated who are not residents or domiciled

within the State of Washington, and are not doing business therein, and who have no agency within said State and have no property within said State which may be seized; and it attempts to escheat and forfeit to the State of Washington copyrights and choses in action as a penalty under said Statute for any alleged violation thereof.

32. The licensing of the right of public performance as provided for by the said State Statute of Washington involves only the incorporeal right secured under the Copyright Law, as distinguished from the material object copyrighted; complainants and the Society in licensing the pub- [fol. 35] lic performance for profit do not furnish, supply or deliver any sheet music to users; they do not deal directly or indirectly with any tangible object or piece of property in connection with the licensing for public performance for profit of their copyrighted musical compositions.

33. Upon information and belief, the said State Statute is a pretext under which the State of Washington is attempting to usurp power to enact copyright laws delegated by the Constitution of the United States solely to Congress, and said State Statute interferes with the copyrights of the complainants and others similarly situated under the guise of an exercise of the police power of said State; the said State Statute, in truth and in fact, was enacted, not in the public interest, but rather for the private benefit and gain of a group of users of music in an organized effort to enable such users to have free access to the copyrighted works of complainants and others similarly situated, without paying compensation therefor, and without danger of being compelled to pay damages for infringement as provided for in the Copyright Act.

34. The per piece system provided for in said State Statute would compel complainants to permit others to publicly perform for profit in the State, regardless of whether or not such persons, firms or corporations properly and honestly accounted for the use of complainants' works; and complainants and others similarly situated would be deprived of the right to enter into voluntary contracts licensing the public performance for profit of their copyrighted musical works, or of the right to determine the conditions [fol. 36] under which such works might be performed, or of the right to limit the frequency of the performance of such

works in order to prevent the destruction of the performing right values thereof.

35. The defendants, Otto Case, as State Treasurer of the State of Washington, Cliff Yelle, as Auditor of the State of Washington, Ernest N. Hutchinson, as Secretary of the State of Washington, G. W. Hamilton, as Attorney General of the State of Washington, B. Gray Warner, as District Attorney of King County, State of Washington, Harry H. Johnston, as District Attorney for Pierce County, State of Washington, Ralph E. Foley, as District Attorney for Spokane County, State of Washington, A. W. Swanson, as District Attorney for Snohomish County, State of Washington, H. W. Covalt, as District Attorney of Whatcom County, State of Washington, Smith Troy, as District Attorney of Thurston County, State of Washington, Paul O. Manley, as District Attorney of Grays Harbor County, State of Washington, John D. Evans, as District Attorney of Yakima County, State of Washington, Glenn L. Bean, as District Attorney of Walla Walla County, State of Washington, and Sam M. Driver, as District Attorney of Chelan County, State of Washington, and "John Doe" and "Richard Roe" have threatened to, and will enforce such State Statute in each and all of its terms and the whole thereof, and particularly against these complainants and others similarly situated, individually and as members of the Society, in the event that such complainants and others similarly situated refuse to file a list of their copyrighted musical works in [fol. 37] the State of Washington when said State Statute goes into effect; or to accept or submit to a per piece system of compensation for involuntary licensing; and said defendants have threatened to enforce the penal and confiscatory provisions of such Statute against complainants and others similarly situated in the event complainants and others similarly situated attempt to enforce the existing contracts between themselves and the Society and between the Society and citizens and residents of the State of Washington; or in the event that complainants and others similarly situated license persons, firms or corporations to publicly perform outside the State of Washington musical compositions, which performances may be reproduced and reperformed within the State of Washington; or in the event that complainants and others similarly situated enter into license agreements without the State of Washington

ith residents of citizens of that State for the right or li-
ense to perform publicly for profit the musical composi-
ions of the complainants and others similarly situated
ithin the State of Washington; or in the event that com-
lainants and others similarly situated enter into license
greements within the State of Washington with persons,
rms or corporations, residents or citizens of that State,
or the purpose of licensing them to publicly perform for
rofit the musical compositions of complainants and others
imilarly situated within or without the State of Washing-
on; or in the event that complainants and others similarly
ituated take any means to detect infringements of their
opyrighted musical works within the State of Washington;
r in the event that complainants and others similarly sit-
ated bring any suits for infringement of their copyrights
fol. 38] in their respective compositions by means of pub-
c performances for profit in the Federal Courts within or
ithout the State of Washington; or in the event that com-
lainants and others similarly situated, being non-residents
nd non-citizens of the State of Washington, and having no
gent or representative and not transacting business within
aid State, or having property therein, fail or refuse to sub-
it to the jurisdiction of the State Courts of Washington;
nd defendants have threatened in the event of the afore-
aid contingencies, or any of them, to enforce the penalties
rovided for in said State Statute, and to proceed to prose-
ute complainants and others similarly situated, their em-
loyees and agents, criminally, for an alleged violation of
aid Statute, and to confiscate, forfeit and escheat their
roperty to the State of Washington, as and when said Stat-
te becomes effective.

35-a. Said Statute is in its terms so drastic, and the pen-
lties attached to the violation of the terms thereof are so
reat, that neither complainants nor others similarly sit-
ated may after said Statute becomes effective (on or about
une 14, 1937) continue to grant licenses to users of music
ithin the State of Washington or even to users of music
ithout the State of Washington if the public perform-
nce for profit of such music may be reproduced or per-
rmed within the State of Washington. There are thirty-
e counties in the State of Washington, in each of which
ere are establishments publicly performing for profit the
pyrighted musical compositions of members of the So-

ciety, including the other complainants herein, and the foreign societies with which the Society has reciprocal arrangements, and if complainants attempt to issue licenses [fol. 39] or collect from licensees or attempt to detect infringements of their copyrighted works in said counties they will be subjected to a multiplicity of suits and prosecutions unless restrained by this Honorable Court; and complainants and others similarly situated will be unable after the effective date of the Statute, to wit, June 14, 1937, to enforce any contracts made between them or on their behalf by the Society with residents or citizens of the State of Washington; complainants and others similarly situated, as well as the Society, will be compelled from and after the effective date of the Statute, to wit, June 14, 1937, to desist from licensing the public performance for profit of their copyrighted musical compositions in the State of Washington, and will be deprived of all sources of revenue therefrom, and will have been denied the privileges granted to them by the Copyright Act; and the Society will be compelled to desist from enforcing collection of payments under existing contracts between it and users after said effective date of said Statute, to wit, June 14, 1937, and will be compelled to desist from investigating infringements of the copyrights of complainants, and other members of the Society and its affiliated societies by means of the public performance for profit of their respective copyrighted musical compositions, unless this Court grant an injunction as prayed for; and the complainants and the Society and its affiliated societies will be hindered, delayed and impeded in enforcing their rights and remedies under the Copyright Act in the Federal Court located in the State of Washington, for infringements committed by users within the State of Washington by means of public performances for profit [fol. 40] of the copyrighted musical compositions aforesaid, all because of the drastic provisions of the said State Statute and the numerous penalties, civil and criminal, as well as forfeiture to which the complainants will be liable in the event of any violation of said State Statute; and complainants and others similarly situated will be unable to detect and sue for infringement of their copyrighted musical works within the State of Washington; unless this Court shall determine the validity and application of said Statute in this proceeding, complainants and others simi-

larly situated will be deprived of the rights granted to them under the United States Constitution and the Copyright Act, and will be without any remedy for the enforcement of such rights within the State of Washington, and they will suffer a cloud upon the title of their works registered with the Register of Copyrights by reason of the fact that defendants have threatened to file with said Register of Copyrights an involuntary assignment of all of complainants' copyrights to the State of Washington, so that complainants will be prevented from exercising rights under their copyrights by reason of said cloud, including the right to assign and otherwise deal in said musical copyrights, as well as to exercise all of the exclusive rights granted by the Copyright Act, as well as to assert the ownership of the exclusive rights granted to them under the Copyright Act; and complainants may be unable to sue for infringement of said copyrights in other States of the United States, because their right thereto may be challenged by reason of said cloud, and they will therefore be deprived of their property and liberty without due process of law, and denied the equal protection of the laws, all in contravention of [fol. 41] Article I, Sections 8, 9 and 10, Article III, Section 2, Article IV, Section 2, and Article VI, Section 2, of the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States, and Article I, Sections 3, 12, 16 and 23 and Article II, Sections 19 and 28 of the Constitution of the State of Washington; and complainants have no adequate remedy at law, and are relievable only in a court of equity.

36. Each of the complainants has received from the Society for the year 1936, as compensation for the public performance for profit of the complainants' works, respectively, in excess of the following sums: Carl Fischer Inc in excess of $50,000.00; G. Schirmer, Inc. in excess of $50,000.00; Irving Berlin, Inc. in excess of $50,000.00; Gene Buck in excess of $5,000.00; Deems Taylor in excess of $5,000.00; Oley Speaks in excess of $5,000.00; William J. Hill in excess of $5,000.00; Anne Paul Nevin in excess of $5,000.00; Ella Herbert Bartlett in excess of $5,000.00; and Jane Sousa in excess of $5,000.00; upon information and belief, complainants will be entitled to receive for the balance of the period for which they have entered into contracts with the Society, and for which the Society has

contracts with users of music, similar amounts for each year, down to December 31, 1940, and such complainants will receive such amounts for said period if their right thereto is not interfered with and destroyed by such State Statute; approximately two-thirds of the revenue obtained by the Society and distributed to the complainants and others similarly situated, is derived from moneys paid for the right to perform publicly for profit by means of radio broadcasting, and if this Court does not interfere and re- [fol. 42] strain the enforcement of such State Statute, such revenue may be lost to the Society, and the complainants and others similarly situated will not participate in royalties from the public performance for profit by means of radio broadcasting, because such performances, even though given in other parts of the United States, may under the provisions of such State Statute, be deemed a violation of such State Statute in the State of Washington, and licenses made outside of the State of Washington may result in forfeiture by the State of Washington of all complainants' copyrights, and complainants will lose the benefit of their said contracts with the Society and all the contracts made between the Society and users of music, and will receive no further moneys from public performance for profit by means of radio broadcasting of their musical compositions.

37. Chapter 218 of the Laws of 1937 of the State of Washington is unconstitutional and void and each and every section thereof is unconstitutional and void under the aforesaid Articles and Sections of the Constitution of the United States mentioned hereinabove, and the Fourteenth Amendment to the Constitution of the United States, in that it deprives complainants of their liberty and property without due process of law and the equal protection of the laws, impairs the obligation of contract, destroys the rights of complainants in their copyrighted works, nullifies valid contracts theretofore entered into, interferes with the Federal judicial power, destroys the privileges and immunities granted to complainants, and attempts to subordinate the Federal Constitution and the Copyright Act to the State of Washingon, and complainants to an unreasonable search [fol. 43] and seizure of their properties, effects, papers and persons.

38. If defendants are not restricted in their threatened and attempted enforcement of such State Statute, the complainants and others similarly situated will suffer great and irreparable loss, for which they have no adequate remedy at law, but are relievable only in a court of equity.

Therefore, the complainants pray:

1. That Otto Case, as State Treasurer of the State of Washington, Cliff Yelle, as Auditor of the State of Washington, Ernest N. Hutchinson, as Secretary of the State of Washington, G. W. Hamilton, as Attorney General for the State of Washington, B. Gray Warner, as District Attorney of King County, State of Washington, Harry H. Johnston, as District Attorney for Pierce County, State of Washington, Ralph E. Foley, as District Attorney of Spokane County, State of Washington, A. W. Swanson, as District Attorney of Snohomish County, State of Washington, H. W. Covalt, as District Attorney of Whatcom County, State of Washington, Smith Troy, as District Attorney of Thurston County, State of Washington, Paul O. Manley, as District Attorney of Grays Harbor County, State of Washington, John D. Evans, as District Attorney of Yakima County, State of Washington, Glenn L. Bean, as District Attorney of Walla Walla County, State of Washington, Sam M. Driver, as District Attorney of Chelan County, State of Washington, and "John Doe" and "Richard Roe", be enjoined and restrained by temporary and permanent order of injunction of this Court, from bringing, directly or indirectly, and from permitting to be brought, directly or indirectly, any proceeding at law or in equity for the purpose [fol. 44] of enforcing said Statute, Chapter 218 of the Laws of 1937 of the State of Washington, against the complainants and others similarly situated, representatives, employees, agents or any of them, including the Society, as and when said Statute goes into effect, and from taking any steps to create or act as an anti-monopoly board, and from demanding a list of copyrights of musical works from complainants and others similarly situated, and from attempting to appoint or take any steps leading to the appointment of a receiver, and from attempting to seize, escheat or confiscate copyrights and choses in action of complainants and others similarly situated, and from attempting to fix any fees or grant licenses on a per piece system or otherwise,

on any of complainants' copyrighted musical works, and from attempting to collect any license fees on the copyrighted musical works of complainants and others similarly situated, and from interfering with all existing contracts entered into between complainants and others, including the Society and citizens and residents of the State of Washington, and from threatening to enforce against any citizens or residents of the State of Washington, the penalties of said Statute in the event such citizens and residents desire to carry out their contracts with Society or complainants and others similarly situated, and from taking steps to declare an involuntary assignment of the copyrights of complainants and others similarly situated, and from filing lists thereof with the Register of Copyrights in Washington, D. C., and from prosecuting criminally the complainants, their representatives or agents, or any of them, or others similarly situated, for doing any act or thing to detect in- [fol. 45] fringement and to enforce their respective rights under the Copyright Act in the Federal Courts of the State of Washington or elsewhere, and generally, from doing any act or thing to carry out or enforce any of the provisions of said State Statute as and when the same goes into effect; and that an order to show cause issue herein upon the application of the complainants, directed to the above named defendants, requiring them to show cause why a temporary injunction should not issue as prayed for herein.

2. That said Statute, Chapter 218 of the Laws of 1937 of the State of Washington, and each and every part and section thereof, be declared to be unconstitutional, illegal and void, and that a perpetual injunction be issued, restraining the enforcement of said Statute and each and every part and section thereof, as hereinabove prayed for.

3. That a writ of subpoena may issue to the defendants, requiring them to answer this bill of complaint fully and truthfully, but not on oath, an oath being hereby waived, and that further and general relief be granted as the nature of complainants' case may require, or to equity may seem just and proper.

Vanderveer and Bassett, Solicitors for Complainants.
Office & P. O. Address, 1311 Alaska Building,
Seattle, Washington.

Gene Buck.

Exhibit "A"

No. 5242—5210

AGREEMENT

between

J. Fischer & Bro. (Inc.), New York City, party of the first part, and Deems Taylor of New York City party of the second part:

I. J. Fischer & Bro. agree to publish Banks O'Doon — Captain Stratton's Fancy by Deems Taylor.

II. J. Fischer & Bro. agree to defray all expenses made necessary to produce printed copies of the first and all subsequent editions of the musical compositions mentioned in Article I.

III. Deems Taylor, party of the second part, or his assigns to receive in consideration of this agreement, ten per cent (10%) of the marked or retail price on every copy sold.

IV. In said J. Fischer & Bro., its successors or assigns, or legal representatives, shall be vested the exclusive right of copyrighting, publishing and vending the said musical compositions by Deems Taylor, party of the second part, or of making arrangements for so doing with its agents and representatives in all countries.

V. J. Fischer & Bro. agree to make settlement annually in the month of January as of January First.

VI. Copies of musical compositions mentioned in Article I. are to be printed and placed on sale when J. Fischer & Bro. find it convenient so to do.

VII. It is further agreed that said Deems Taylor, party of the second part, shall forthwith sell, assign, transfer and turn over to J. Fischer & Bro., party of the first part, his copyright and all his title and interest in and rights under the same unto the said J. Fischer & Bro., for the consideration aforesaid.

VIII. In said J. Fischer & Bro., party of the first part, its successors or assigns, shall be vested the rights during the full life of copyright to authorize or permit the performance of the musical compositions mentioned in Article I.

IN WITNESS WHEREOF the party of the first part has hereunto affixed its corporate seal and the party of the second part his hand and seal this Sixteenth day of March, 1923.

Witness: J. FISCHER & BRO.

A. Schmitt ..... as to by .....

H. Roth ..... as to .....Deems Taylor.....(L. S.)

1930-1940

No.
Rec'd 4/25/35

Exhibit "B"

Agreement Between

Carl Fischer, Inc.

and

American Society

of

Composers, Authors & Publishers

Thirty Rockefeller Plaza

NEW YORK CITY

DATED:

April 12th, 1935.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (for brevity called "Society"), in consideration of the premises and of the mutual covenants hereinafter contained, as follows:

The **Owner** sells, assigns, transfers and sets over unto the **Society** for the term hereof, the entire exclusive right of public performance (as hereinafter defined), in each musical work:

Of which the **Owner** is a copyright proprietor; or

Which the **Owner**, alone, or jointly, or in collaboration with others, wrote, composed, published, acquired or owned; or

In which the **Owner** now has any right, title, interest or control whatsoever, in whole or in part; or

Which hereafter, during the term hereof, may be written, composed, acquired, owned, published or copyrighted by the **Owner**, alone, jointly or in collaboration with others; or

In which the **Owner** may hereafter, during the term hereof, have any right, title, interest or control, whatsoever, in whole or in part.

The exclusive right of public performance in every musical work shall be deemed assigned to the **Society** by this instrument and shall vest in and be the absolute property of the **Society** for the term hereof, immediately upon the work being written, composed, acquired, owned, published or copyrighted.

The rights hereby assigned shall include:

(a) All the rights and remedies for enforcing the copyright or copyrights of such musical works, whether such copyrights are in the name of the **Owner** and/or others, as well as the right to sue under such copyrights in the name of the **Society** and/or in the name of the **Owner** and/or others, to the end that the **Society** may effectively protect and be assured of all the rights hereby assigned.

(b) The exclusive right of public performance of the separate numbers, songs, fragments or arrangements, melodies or selections forming part or parts of musical plays and dramatico-musical compositions, the **Owner** reserving and excepting from this assignment the right of performance of musical plays and dramatico-musical compositions in their entirety, or any part of such plays or dramatico-musical compositions on the legitimate stage.

(c) The right of public performance by means of radio broadcasting, telephony, "wired wireless," all forms of synchronism with motion pictures, and/or any method of transmitting sound; Provided, however, that the **Owner** shall have the right, in good faith, by written notice to the **Society**, to restrict, limit or prohibit the public performance by radio broadcasting of works the copyright of which is vested in the **Owner**, and the **Society** agrees that all licenses by it issued shall contain a provision reserving its right to restrict or limit, or to prohibit entirely, the performance by broadcasting of any works in its repertory; and Provided further, that if the **Owner** notify the **Society** in writing to restrict, limit or prohibit the public performance of such copyrighted work, the **Owner** shall not, by the service of such notice, become repossessed of any of the rights transferred to the **Society** by this assignment.

2. The term of this agreement shall be for a period of five (5) years from the first day of January, 1936, and expiring on the 31st day of December, 1940.

3. The **Society** agrees, during the term hereof, in good faith to use its best endeavors to promote and carry out the objects for which it was organized, and to hold and apply all royalties, profits, benefits and advantages arising from the exploitation of the rights assigned to it by its several members, including the **Owner**, to the uses and purposes as provided in its Articles of Association (to which reference is hereby made), as now in force or as hereafter amended.

4. The **Owner** hereby irrevocably, during the term hereof, authorizes, empowers and vests in the **Society** exclusively, the right to enforce and protect such rights of public performance under any and all copyrights, whether standing in the name of the **Owner** and/or others, in any and all works copyrighted by the **Owner**, and/or by others; to prevent the infringement thereof, to litigate, collect and receipt for damages arising from infringement, and in its sole judgment to join the **Owner** and/or others in whose names the copyright may stand, as parties plaintiff or defendants in suits or proceedings; to bring suit in the name of the **Owner** and/or in the name of the **Society**, or others in whose name the copyright may

stand, or otherwise, and to release, compromise, or refer to arbitration any actions, in the same manner and to the same extent and to all intents and purposes as the **Owner** might or could do, had this instrument not been made.

5. The **Owner** hereby makes, constitutes and appoints the **Society**, or its successor, the **Owner's** true and lawful attorney, irrevocably during the term hereof, and in the name of the **Society** or its successor, or in the name of the **Owner**, or otherwise, to do all acts, take all proceedings, execute, acknowledge and deliver any and all instruments, papers, documents, process and pleadings that may be necessary, proper or expedient to restrain infringements and recover damages in respect to or for the infringement or other violation of the rights of public performance in such works, and to discontinue, compromise or refer to arbitration any such proceedings or actions, or to make any other disposition of the differences in relation to the premises.

6. The **Owner** agrees from time to time to execute, acknowledge and deliver to the **Society**, such assurances, powers of attorney or other authorizations or instruments as the **Society** may deem necessary or expedient to enable it to exercise, enjoy and enforce, in its own name or otherwise, all rights and remedies aforesaid.

7. It is mutually agreed that during the term hereof the Board of Directors of the **Society** shall be composed of an equal number of writers and publishers respectively, and that the royalties distributed by the Board of Directors shall be divided into two (2) equal sums, and one (1) each of such sums credited respectively to and for division amongst (a) the writer members, and (b) the publisher members, in accordance with the system of distribution and classification as determined by the Classification Committee of each group, in accordance with the Articles of Association as they may be amended from time to time, except that the classification of the **Owner** within his class may be changed.

8. The **Owner** agrees that his classification in the **Society** as determined from time to time by the Classification Committee of his group and/or the Board of Directors of the **Society**, in case of appeal by him, shall be final, conclusive and binding upon him.

The **Society** shall have the right to transfer the right of review of any classification from the Board of Directors to any other agency or instrumentality that in its discretion and good judgment it deems best adapted to assuring to the **Society's** membership a just, fair, equitable and accurate classification.

The **Society** shall have the right to adopt from time to time such systems, means, methods and formulae for the establishment of a member's status in respect of classification as will assure a fair, just and equitable distribution of royalties among the membership.

9. **"Public Performance" Defined.** The term **"public performance"** shall be construed to mean vocal, instrumental and/or mechanical renditions and representations in any manner or by any method whatsoever, including transmissions by radio broadcasting stations, transmission by telephony and/or "wired wireless"; and/or reproductions of performances and renditions by means of devices for reproducing sound recorded in synchronism or timed relation with the taking of motion pictures.

10. **"Musical Works" Defined.** The phrase **"musical works"** shall be construed to mean musical compositions and dramatico-musical compositions, the words and music thereof, and the respective arrangements thereof, and the selections therefrom.

11. The powers, rights, authorities and privileges by this instrument vested in the **Society**, are deemed to include the World, provided, however, that such grant of rights for foreign countries shall be subject to any agreements now in effect, a list of which are noted on the reverse side hereof.

12*—As per rider below

SIGNED, SEALED AND DELIVERED, on this 12th day of April, 1935.

Owner Carl Fischer Inc.
per Walter Fischer Pres

Society AMERICAN SOCIETY OF COMPOSERS AUTHORS AND PUBLISHERS
By Joseph Young
Secretary

*—12. This rider constitutes #12 of the foregoing contract.
By accepting this contract the Society agrees that all agreements heretofore or here-

FOREIGN AGREEMENTS AT THIS DATE IN EFFECT

(See paragraph 11 of the within agreement)

It is distinctly agreed and understood that the powers, rights, authorities and privileges vested in the Society by this instrument, do not include world rights, but are restricted to the United States, ———, Austria, Denmark, France, Belgium, Egypt, Greece, Holland, Japan, Monaco, Portugal, Roumania, Switzerland, Germany, Hungary and Italy.

1—8—36.

It is also understood and agreed that the powers, rights, authorities and privileges vested in the Society by the within instrument shall include Great Britain.

1936-1940

No.

Rec'd 6/25/35

Exhibit "C"

Agreement Between

Gene Buck

and

American Society

of

Composers, Authors & Publishers

Thirty Rockefeller Plaza

NEW YORK CITY

DATED:

June 25th, 1935.

AGREEMENT made between the Undersigned (for brevity called "Owner") and the AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (for brevity called "**Society**"), in consideration of the premises and of the mutual covenants hereinafter contained, as follows:

The **Owner** sells, assigns, transfers and sets over unto the **Society** for the term hereof, the entire exclusive right of public performance (as hereinafter defined), in each musical work:

Of which the **Owner** is a copyright proprietor; or

Which the **Owner**, alone, or jointly, or in collaboration with others, wrote, composed, published, acquired or owned; or

In which the **Owner** now has any right, title, interest or control whatsoever, in whole or in part; or

Which hereafter, during the term hereof, may be written, composed, acquired, owned, published or copyrighted by the **Owner**, alone, jointly or in collaboration with others; or

In which the **Owner** may hereafter, during the term hereof, have any right, title, interest or control, whatsoever, in whole or in part.

The exclusive right of public performance in every musical work shall be deemed assigned to the **Society** by this instrument and shall vest in and be the absolute property of the **Society** for the term hereof, immediately upon the work being written, composed, acquired, owned, published or copyrighted.

The rights hereby assigned shall include:

(a) All the rights and remedies for enforcing the copyright or copyrights of such musical works, whether such copyrights are in the name of the **Owner** and/or others, as well as the right to sue under such copyrights in the name of the **Society** and/or in the name of the **Owner** and/or others, to the end that the **Society** may effectively protect and be assured of all the rights hereby assigned.

(b) The exclusive right of public performance of the separate numbers, songs, fragments or arrangements, melodies or selections forming part or parts of musical plays and dramatico-musical compositions, the **Owner** reserving and excepting from this assignment the right of performance of musical plays and dramatico-musical compositions in their entirety, or any part of such plays or dramatico-musical compositions on the legitimate stage.

(c) The right of public performance by means of radio broadcasting, telephony, "wired wireless," all forms of synchronism with motion pictures, and/or any method of transmitting sound; Provided, however, that the **Owner** shall have the right, in good faith, by written notice to the **Society**, to restrict, limit or prohibit the public performance by radio broadcasting of works the copyright of which is vested in the **Owner**, and the **Society** agrees that all licenses by it issued shall contain a provision reserving its right to restrict or limit, or to prohibit entirely, the performance by broadcasting of any works in its repertory; and Provided further, that if the **Owner** notify the **Society** in writing to restrict, limit or prohibit the public performance of such copyrighted work, the **Owner** shall not, by the service of such notice, become repossessed of any of the rights transferred to the **Society** by this assignment.

2. The term of this agreement shall be for a period of five (5) years from the first day of January, 1936, and expiring on the 31st day of December, 1940.

3. The **Society** agrees, during the term hereof, in good faith to use its best endeavors to promote and carry out the objects for which it was organized, and to hold and apply all royalties, profits, benefits and advantages arising from the exploitation of the rights assigned to it by its several members, including the **Owner**, to the uses and purposes as provided in its Articles of Association (to which reference is hereby made), as now in force or as hereafter amended.

4. The **Owner** hereby irrevocably, during the term hereof, authorizes, empowers and vests in the **Society** exclusively, the right to enforce and protect such rights of public performance under any and all copyrights, whether standing in the name of the **Owner** and/or others, in any and all works copyrighted by the **Owner**, and/or by others; to prevent the infringement thereof, to litigate, collect and receipt for damages arising from infringement, and in its sole judgment to join the **Owner** and/or others in whose names the copyright may

the **Owner** and/or in the name of the **Society**, or others in whose name the copyright may stand, or otherwise, and to release, compromise, or refer to arbitration any actions, in the same manner and to the same extent and to all intents and purposes as the **Owner** might or could do, had this instrument not been made.

5. The **Owner** hereby makes, constitutes and appoints the **Society**, or its successor, the **Owner's** true and lawful attorney, irrevocably during the term hereof, and in the name of the **Society** or its successor, or in the name of the **Owner**, or otherwise, to do all acts, take all proceedings, execute, acknowledge and deliver any and all instruments, papers, documents, process and pleadings that may be necessary, proper or expedient to restrain infringements and recover damages in respect to or for the infringement or other violation of the rights of public performance in such works, and to discontinue, compromise or refer to arbitration any such proceedings or actions, or to make any other disposition of the differences in relation to the premises.

6. The **Owner** agrees from time to time to execute, acknowledge and deliver to the **Society**, such assurances, powers of attorney or other authorizations or instruments as the **Society** may deem necessary or expedient to enable it to exercise enjoy and enforce, in its own name or otherwise, all rights and remedies aforesaid.

7. It is mutually agreed that during the term hereof the Board of Directors of the **Society** shall be composed of an equal number of writers and publishers respectively, and that the royalties distributed by the Board of Directors shall be divided into two (2) equal sums and one (1) each of such sums credited respectively to and for division amongst (a) the writer members, and (b) the publisher members, in accordance with the system of distribution and classification as determined by the Classification Committee of each group, in accordance with the Articles of Association as they may be amended from time to time, except that the classification of the **Owner** within his class may be changed.

8. The **Owner** agrees that his classification in the **Society** as determined from time to time by the Classification Committee of his group and/or the Board of Directors of the **Society**, in case of appeal by him, shall be final, conclusive and binding upon him.

The **Society** shall have the right to transfer the right of review of any classification from the Board of Directors to any other agency or instrumentality that in its discretion and good judgment it deems best adapted to assuring to the **Society's** membership a just, fair, equitable and accurate classification.

The **Society** shall have the right to adopt from time to time such systems, means, methods and formulae for the establishment of a member's status in respect of classification as will assure a fair, just and equitable distribution of royalties among the membership.

9. **"Public Performance" Defined.** The term **"public performance"** shall be construed to mean vocal, instrumental and/or mechanical renditions and representations in any manner or by any method whatsoever, including transmissions by radio broadcasting stations, transmission by telephony and/or "wired wireless"; and/or reproductions of performances and renditions by means of devices for reproducing sound recorded in synchronism or timed relation with the taking of motion pictures.

10. **"Musical Works" Defined.** The phrase **"musical works"** shall be construed to mean musical compositions and dramatico-musical compositions, the words and music thereof, and the respective arrangements thereof, and the selections therefrom.

11. The powers, rights, authorities and privileges by this instrument vested in the **Society**, are deemed to include the World, provided, however, that such grant of rights for foreign countries shall be subject to any agreements now in effect, a list of which are noted on the reverse side hereof.

SIGNED, SEALED AND DELIVERED, on this 20th day of June, 1935.

Irene Buck
.....

Owner

.....

AMERICAN SOCIETY OF COMPOSERS
AUTHORS AND PUBLISHERS

Society

By Joseph W. Young
Secretary

40

Exhibit "D"

Articles of Association

of the

American Society

of

Composers, Authors

and

Publishers

AS IN EFFECT

1935

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Of
AMERICAN SOCIETY of COMPOSERS, AUTHORS and PUBLISHERS

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Article I
Objects

SECTION 1. We constitute ourselves a voluntary association under the name of "American Society of Composers, Authors and Publishers," for the following purposes, to-wit:

(a) To protect composers, authors and publishers of musical works against piracies of any kind;

(b) To promote reforms in the law respecting literary property;

(c) To Procure uniformity and certainty in the law respecting literary property in all countries;

(d) To facilitate the administration of the copyright laws for the protection of composers, authors and publishers of musical works;

(e) To abolish abuses and unfair practices and methods in connection with the reproduction of musical works;

(f) To promote and foster by all lawful means the interest of composers, authors and publishers of musical works;

(g) To grant licenses and collect royalties for the public representation of the works of its members by instrumentalists, singers, mechanical instruments, radio broadcasting stations, or any kind of combination of singers, instrumentalists and mechanical instruments, and to allot and distribute such royalties;

(h) To adjust and arbitrate differences and controversies between its members and between its members and others, and to represent its members in controversies, actions and proceedings, involving the right of public performance of any work of any member, or the question of authorship in any work of any member;

(i) To promote friendly intercourse and united action among composers, authors, publishers and producers of musical works;

(j) To acquire, own and sell real and personal property, and to accumulate and maintain a reserve fund to be used in carrying out any of the objects of the society.

(k) To enter into agreements with other similar associations in foreign countries, providing for the reciprocal protection of the rights of the members of each society.

(l) To do any and all other acts or things which may be found necessary or convenient in carrying out any of the objects of the Society or in protecting or furthering its interests or the interests of its members.

SECTION 2. The principal office of the Society is to be located in the City of New York.

Article II
Duration

The duration of the Society shall be ninety-nine years.

Article III
Membership

SECTION 1. The membership of this Society shall be divided into five classes, as follows:

Music Publishers

Any person, partnership, firm or corporation regularly engaged for a period of not less than one year in the music publishing business shall be eligible to membership in this class.

Composers and Authors

Any composer and/or author of musical works who regularly practices the profession of writing music and/or the text or lyrics of musical works, and who shall have had not less than five works of his composition or writing regularly published, shall be eligible to membership in this class.

Non-Participating

Each person, partnership, firm or corporation hereafter elected to membership shall be first assigned to this Class, and shall remain therein for a period not exceeding one year from election. At the termination of the said period the Board of Directors shall, by two-thirds vote of those present, determine whether the membership in this class shall continue, and if so for what additional period, or shall be transferred to the appropriate one of the two preceding classes, or be discontinued. No such membership shall, however, be discontinued except after due notice to the member and an opportunity afforded him to appear before the Board of Directors and show cause why the same should not be discontinued.

benefits, privileges, royalties or emoluments of the two preceding classes of members.

Honorary Membership

Any person, firm or corporation which has rendered to the art or industry of music, or to this Society, a notable or conspicuous service, may be eligible in this Class and elected thereto by unanimous vote of the Board of Directors. All nominations in respect of this class of membership shall, however, be tabled at the meeting first presented, and may not be acted upon until or after the next succeeding meeting.

Members in this Class shall not be entitled to vote, hold office, or share in any of the rights, benefits, privileges, royalties or emoluments of the first two Classes hereinabove described.

Successors of Deceased Composers and Authors

Any person who has acquired, by will or under any law, the right, title and interest of a deceased composer or author in any musical works, including the right of public performance thereof, may be elected to membership under this Class. Members of this Class shall not have voting power or be eligible to office.

Dues

SECTION 2. The annual dues, payable on the first day of January in each year, shall be as follows:

Music Publishers	$50.00
Composers and Authors	10.00
Successors to Deceased Composers and Authors	10.00

Upon election to either of the above Classes the member shall pay the pro-rata of annual rate to the first day of the following January, and thereafter at the annual rate of his Class.

Non-Participating	None
Honorary	None

Unless otherwise directed by the Board of Directors, all sums received in payment of dues shall be for the use and benefit of the Relief Fund of the Society.

Upon the default in excess of ninety days in payment of any dues, after notice thereof to the member, the Board of Directors may suspend or expel the delinquent member.

Application for Membership

SECTION 3. Shall be made in writing upon a printed blank form prepared by the Committee on Membership. Every application shall be signed by an individual applicant in person, by a firm, through a co-partner, by an association or corporation through a duly authorized officer. The application shall be submitted to the Membership Committee and shall be accompanied by proof of eligibility to membership.

Intent of Application

SECTION 4. The signing and presentation of such an application to the Membership Committee, shall be deemed and construed to be an agreement on the part of the applicant to fulfill, duly perform, and abide by the Articles of Association, and all requirements herein contained; and to conform to, duly perform and abide by, all by-laws, rules, regulations or resolutions, whether expressed in the Articles of Association or otherwise, which may be in force at the time of such application or may thereafter from time to time be adopted, and to all amendments of and additions to the Articles of Association, by-laws, rules or regulations which after the time of such application may from time to time be adopted.

Election to Membership

SECTION 5. A majority vote of all members of the Board of Directors shall be necessary to elect an applicant to membership.

Obligation of Applicant

SECTION 6. Each member shall, upon election to Active Membership, execute an assignment in such form as the Board of Directors shall approve, vesting in the Society the exclusive right to license the non-dramatic public performance of the members works for the period of any then existing agreement between the Society and its members.

Members' List of Works

SECTION 7. The applicant on being elected to membership shall, upon request, state upon a regular printed form furnished by the Secretary, a brief title, description and the date of copy-

work of which he is the author, composer or publisher, furnish to the Secretary, a brief title, description, and the date of copyright thereof.

Transfer of Non-Participating Member

SECTION 8. Upon the transfer of a non-participating member to either "Music Publisher" or "Composers and Authors" Class, and before the transfer shall be deemed as in effect, the member shall execute and deliver to the Society an assignment of non-dramatic public performing rights, in the form submitted by the Society, all of which rights so vested in the Society shall be known as the "performing rights" and are to be held and enjoyed by the Society from the date of election to expiration of any then existing agreement between the Society and its members.

Membership Roll

SECTION 9. It shall be the duty of the Membership Committee to prepare and keep a membership roll or list of members of the Society.

False Representation by Member

SECTION 10. Whenever it shall appear to a majority of the Membership Committee that a misstatement upon a material point has been made to it by a member, upon his application either for membership or reinstatement, it shall report the case to the Board of Directors, who by a two-thirds vote of all the members of the Board may expel the member after a trial as in these articles provided.

Failure of Member to Qualif

SECTION 11. If within six weeks after the transfer of a "Non-Participating" member to either "Music Publishers" or "Composers and Authors" Class, the members shall have failed to execute and deliver to the Society the assignment as provided by Section 8 preceding, and to comply with all other rules, regulations and requirements of the Society, the membership shall be discontinued.

Voting

SECTION 12. No co-partnership, firm, association or corporation shall have more than one vote or representative in the Society. In case of a co-partnership, a member thereof, and in case of an association or corporation, an officer thereof, shall be duly designated as its representative. Such designation shall be filed with the Secretary of the Society.

Article IV
Management
Board of Directors
Elections

SECTION 1. The government of the Society shall be vested in, and its affairs shall be managed by a Board of twenty-four directors. They shall be elected at each annual meeting of the Board of Directors by a two-thirds vote of the entire Board and shall continue until their successors are elected. They shall be divided into three divisions of equal number. At the first election hereafter held one division, consisting of four publishers, two authors and two composers, shall be elected for one year; one division similarly constituted for two years and one division similarly constituted for three years; but when the term of each division expires their successors shall be elected by the Board of Directors for three years.

At all times six of the members of the Board shall be composers, six authors and twelve publishers. Any vacancy in the Board shall be filled from the class of members in which the vacancy occurred and shall by nomination of the remaining Board members of such class, be elected by a two thirds vote of the directors present.

Thirteen members shall be necessary to constitute a quorum, and the affirmative vote of two-thirds of such quorum shall be required and shall be sufficient to adopt or pass any motion or resolution authorizing or directing any act or thing within the power of the Board. Any number less than a quorum may meet and adjourn from time to time until a quorum be present.

The Board may determine the rules of its procedure and make any and all regulations necessary for the carrying on of the business of the Board of Directors and the officers, agents and servants of the Society.

Any former President of the American Society of Composers, Authors and Publishers shall be ex-officio member of the Board of Directors, without the right to vote. *Adopted—March* 25, 1931.

SECTION 2. The Board shall meet at least once in each month except in the months of July, August and September, and shall hold an annual meeting in the month of January of each year. Notices of regular or special meetings of the Board of Directors shall be given by mail by the Secretary to each director at his last known post office address at least two days previous to the time fixed for the meeting. Special meetings of the Board of Directors may be called by the President or Secretary, and shall be called by either of them on written request of any seven directors.

Report of Board at Meetings

SECTION 3. The Board of Directors shall keep a record of its proceedings which shall be submitted at the annual meeting of the Society, and shall report at such meeting, or at any special meeting of the Society, any business which in its judgment requires the action of the Society.

Article V

Powers of the Board of Directors

Management

SECTION 1. The Board of Directors shall have charge of and supervision over the general management of the business of the Society, and in addition to the powers by these articles expressly conferred upon it, may exercise all such powers and do all such acts and things as may be exercised or done by the Society.

Contracts

SECTION 2. Without prejudice to the general powers conferred by the last preceding section and the other powers conferred by these articles, it is hereby expressly declared that the Board of Directors shall have the following powers, that is to say:

To make contracts or authorize contracts to be made by officers of the Society or by any of the committees provided for by these articles; to fix the rate, time and manner of payment of royalties for the performances of all works registered with the Society; to collect such royalties; to maintain all legal proceedings necessary to enforce payment of such royalties and compromise claims for damages and penalties for unlawful performances; to distribute among the members the royalties collected in the proportionate shares provided for in the scheme of allotment of royalties prescribed in these articles; to enforce the fulfillment of all contracts, both on the part of the members of the Society and third parties, that may have been made by the Society; to authorize the prosecution and defense of any matter, action or proceeding within the scope of the Society, or affecting its interests or involving the rights of public performance of any work of any member or the question of authorship in any work of any member.

To purchase or otherwise acquire for the Society any property, rights and privileges which the Society is authorized to acquire, at such prices and on such terms and conditions, and for such considerations, as it thinks fit.

To appoint and at its discretion remove or suspend, such assistant secretaries, assistant treasurers, managers, subordinates, assistants, clerks, agents and servants, permanently or temporarily, as it may from time to time think fit, and to determine their duties and fix and from time to time change their salaries or emoluments, and to require security in such instances and in such amounts as it may think fit.

To confer by resolution upon any committee or officer of the Society the right to choose, remove or suspend such subordinate officers, agents or servants.

To determine who shall be authorized to sign, on the Society's behalf, receipts, endorsements, checks, releases, contracts and documents.

From time to time to provide for the management of the affairs of the Society in such manner as it thinks fit, and in particular from time to time to delegate any of the powers of the Board of Directors to any Committees, officers or agents, and to appoint any persons to be the agents of the Society, with such powers (including the power to sub-delegate) and upon such terms as may be thought fit.

To appoint and dissolve all committees; to define, alter and regulate the jurisdiction and exercise original and supervisory jurisdiction over any and all subjects and matters referred to said committees; it may direct and control their actions or proceedings at any stage thereof, and shall try all charges against members and punish such as may be found guilty.

The Board of Directors shall have the power to make such regulations and to take such action not inconsistent with the articles of association and the by-laws, as it may deem advisable for the

Society.

The Board of Directors shall have the control over and power of disposition of all funds belonging to the Society. It shall determine the manner and form of their investment and the depositaries of such funds.

Salaries of Directors

SECTION 3. Directors as such shall not receive any salaries for their services except that the sum of $240 may be appropriated out of the treasury at each meeting of the Board of Directors for distribution as attendance fees among such directors of the 24 members of the Board as shall be present within five minutes after the meeting has been called to order.

In case a director shall be absent from three consecutive meetings of the Board of Directors, unless he shall have been by the President excused from attendance, his office as a Director, and any other office held, shall be declared vacant, and at the next regular meeting of the Board of Directors a successor shall be elected.

SECTION 4. That no resolution increasing salaries or granting emoluments to officers and employees receiving $5,000.00 yearly or more, or making unusual or extraordinary expenditure or financial committment may be passed by the Board of Directors until such resolution is first proposed at a regular or special meeting of the Board of Directors and laid upon the table for final action at its next succeeding meeting. Notice of the meeting at which such resolution is to be voted upon granting the same must be given to the members of the Board in writing at least five days in advance.

Adopted—March 28th, 1929.

Vacancy in Board of Directors

SECTION 5. In case of the death, removal or resignation of a director, or of any vacancy in the Board of Directors, such vacancy shall be filled by the election of a director belonging to the same class of directors as the member of the Board whose place is to be filled, for the unexpired term, at the next regular meeting, in the manner provided for the election of directors by the Board of Directors at annual meetings.

Removal or Suspension of Director or Officer

SECTION 6. In case, at any regular or special meeting of the Board of Directors, two-thirds of those present shall be of the opinion that sufficient cause exists for the removal of any director or officer from such office, and that his removal is for the best interest of the Society, a special meeting of the Board of Directors shall be called, upon three days' written notice to each of the directors, specifying the charges against the director or officer against whom such are directed, and a copy of such charges shall be served upon the director or officer so charged, at least three days before such special meeting. In case, at such special meeting, the directors shall after hearing such director or officer, determine by an affirmative vote of two-thirds of all the directors in office, that sufficient cause exists for his removal, and that his removal is for the best interest of the Society, then such person shall immediately cease to be a director or officer as the case may be, and the resulting vacancy shall be filled as provided in Section 5 next above.

The Board of Directors may suspend from office any officer or director against whom charges have been preferred.

Disqualification of Member of Board of Directors

SECTION 7. No member of the Board of Directors shall be disqualified from participating in any meeting, action or proceeding of any kind whatever of said Board of Directors, by reason of being or having been a member of a Standing Committee or Special Committee which has made prior inquiry, examination or investigation of the matter under consideration. Nor shall any member of any Standing or Special Committee be disqualified, by reason of such membership, from acting as a member of the Board of Directors upon any appeal from any decision of such Standing or Special Committee. But no member shall participate in the adjudication of any case in which he is personally interested.

Examination of Member

SECTION 8. The Board of Directors may, by a two-thirds vote of its members present, require that any member of the Society shall submit to the Board of Directors or any Standing or Special Committee, for examination, such portion of his books or papers as are material and relevant to any matter under investigation by said Board of Directors or by any Standing or Special Committee.

any such required evidence, or who, being duly summoned, in pursuance of a two-thirds vote of the members of the Board of Directors present, shall refuse or neglect to appear before the Board of Directors or any Standing or Special Committee, as a witness, or refuse to testify before any such Committee, may be adjudged guilty of an act detrimental to the interest or welfare of the Society.

Final Decision by Trial

SECTION 9. Any hearing or trial may be adjourned, from time to time, by the Board of Directors in its discretion; but no member thereof, who shall not have been present at every meeting of said Board of Directors at which evidence is taken, or at which an accused member, or a member whose conduct is involved in the hearing or trial, is heard, shall participate in the final decision.

Article VI
Officers

SECTION 1. Shall consist of a President, two Vice-Presidents, a Secretary, Assistant Secretary, a Treasurer and an Assistant Treasurer who shall be Directors of the Society, and a Counsel who need not be a member of the Society.

Election of Officers

SECTION 2. The President, the Vice-Presidents, the Secretary, Assistant Secretary, the Treasurer, and Assistant Treasurer, shall be elected annually by the Board of Directors by a two-thirds vote of the entire board, and such officers shall hold the same offices in the Board of Directors. Each officer, excepting the Counsel, shall serve for the term of one year and until the election and qualification of his successor.

Appointment of Counsel

SECTION 3. The Counsel shall be appointed by the Board of Directors for such term as may be decided by the Board.

Vacancy of Office

SECTION 4. In case a vacancy shall occur in the office either of the President, Vice-Presidents, Secretary, Assistant Secretary, Treasurer or Assistant Treasurer, an election shall be held forthwith to fill vacancy for the unexpired term.

Expulsion or Suspension of Officer

SECTION 5. The expulsion or suspension of a member holding any office or position, to which he has been either elected or appointed, shall create a vacancy therein which shall be filled as provided in these articles.

Article VII
The President

SECTION 1. The President shall be the chief executive officer of the Society. He shall preside at all meetings of the Board of Directors. He shall have general supervision over the business affairs and property of the Society and over its several officers.

He shall see that all orders and resolutions of the Board of Directors and of the Society are carried into effect and he shall sign all contracts and agreements authorized by the Board of Directors, unless the Board shall otherwise direct. The President shall submit to the Board of Directors, as soon as may be after the close of each fiscal year, and to the members at each annual meeting a complete report of the operations of the Society or the preceding year, and of the state of its affairs, making such recommendations as he thinks proper, and he shall from time to time report to the Board of Directors all matters within his knowledge which the interests of the members may require to be brought to its notice. The President shall be ex-officio a member of all standing committees.

Article VIII
The Vice-President

SECTION 1. The Vice-President shall have such powers and perform such duties as the Board of Directors may from time to time prescribe, and perform such other duties as may be prescribed in these by-laws. In case of the absence of the President or his inability to act, the Vice-President shall discharge the duties of the President.

SECTION 1. The Treasurer shall have charge of the funds, securities, receipts and disbursements of the Society. He shall deposit all moneys and other valuable effects in the name and to the credit of the Society in such depositaries as the Board of Directors may from time to time designate. He shall disburse the funds of the Society as may be ordered by the Board, by checks or drafts upon the authorized depositaries of the Society, signed by the President or Vice-President and countersigned by himself or an assistant Treasurer. He shall take and preserve proper vouchers for all moneys disbursed. He shall render to the President or to the directors, at the regular meetings of the Board, whenever the President or said Board shall require him to do so, and at every annual meeting of the Society an account of the financial conditions of the Society and of all of his transactions as Treasurer; and as soon as may be after the close of each fiscal year he shall make and submit to the Board of Directors a like report for each fiscal year. He shall keep at the principal office of the Society full and correct books of account of all its business and transactions. He shall give to the Society a bond in such sum as the Board of Directors may from time to time designate conditioned for the faithful performance of the duties of his office and the restoration to the Society at the expiration of the term of his office or in case of his death, resignation or removal from office, of all books, papers, vouchers, money or other property of whatever kind in his possession belonging to the Society. In the absence of the Treasurer or his inability to act, the Assistant Treasurer shall perform all the duties of the Treasurer. The Treasurer shall pay no bills unless they are properly certified by the officer or committee authorized by the Board of Directors to make the expenditures. The books and accounts of the Society shall be audited monthly in such manner as the Board of Directors may order.

Article X
The Secretary

SECTION 1. The Secretary shall be ex-officio Secretary of the Board of Directors and of all standing committees. He shall record all the votes and proceedings of the meetings of the Society, and of the Board of Directors, and of all committees, in a book or books. He shall record all the votes and proceedings of the meetings of the Society, and when authorized by the Board of Directors he shall affix such seal to any instrument requiring the same. He shall countersign all contracts and agreements signed by the President. The seal of the Society, so affixed, shall always be attested by the signature of the Secretary, or an Assistant Secretary. He shall give notice of all meetings of the Society, and of the Directors, and of all committees and of all calls for assessments to be paid by the members. The Secretary shall also have such other powers and perform such other duties as pertain to his office, or as the Board of Directors may from time to time prescribe. In the absence of the Secretary or his inability to act, the Assistant Secretary shall have all the foregoing duties.

Article XI
The Counsel

The Counsel shall be the legal adviser of the Society, the Board and the various committees. He shall have supervision of all matters involving legal questions, and shall appear for the Society in all actions or proceedings.

Article XII
Absence or Suspension of Officer

In case of the absence of the President, a Vice-President, the Secretary, Assistant Secretary, the Treasurer or Assistant Treasurer, or in case of the suspension of any such officer pending his trial on charges, the Board may delegate his powers and duties to any other officer, or to any Director for the time being.

Article XIII
Order of Business, Directors' Meetings

The order of business at the meetings of the Board shall be as follows:

1. A quorum of thirteen members being present the President shall call the Board to order.
2. The minutes of the last meeting shall be read and considered as approved, if there be no amendments.
3. Reports of officers of the Society.
4. Reports of Committees.

6. Miscellaneous business.
7. New business.

Article XIV
Standing Committees

SECTION 1. FINANCE COMMITTEE. There shall be a Finance Committee of three Directors appointed by the President, who shall attend to and supervise all the fiscal operations of the Society to the extent and in the manner directed by the Board, and this or such other committee as may be appointed by the President shall examine all accounts of the Society at the close of each fiscal year and at such other times as may be deemed necessary, and report thereon.

SECTION 2. ADMINISTRATIVE COMMITTEE. The President may also appoint an Administrative Committee from the members, who shall advise with and aid the officers of the Society in all matters concerning its interests and the management of its business and generally perform such duties and exercise such powers as may be prescribed or delegated by the Board of Directors from time to time. This Committee shall consist of such number as the President shall from time to time see fit. (See Section 5.)

SECTION 3. MEMBERSHIP COMMITTEE. The President shall appoint a Membership Committee consisting of five directors who shall pass upon the applications filed with the Committee and shall verify the statements therein contained, and may require of each applicant additional proof of eligibility to membership.

SECTION 4. COMPLAINT COMMITTEE. The Complaint Committee shall consist of three members of the Board appointed by the President.

Any member against whom a complaint is made before this Committee of violation of the Articles of Association, the by-laws or any resolution of the Society, or of the Board of Directors, regulating the conduct of the members, or of any conduct or proceeding inconsistent with the Articles of Association, or of misconduct, fraud, fraudulent acts or acts derogatory to the welfare of or prejudicial to the Society, shall be notified thereof, and if he desires he shall be heard in his defense, and shall be afforded an opportunity to examine all charges, papers and evidence submitted to the Committee, and to make answer thereto. The Committee shall have power to make rules respecting hearings upon such complaints. Proceedings before the Committee shall be confidential, and shall be disclosed only as the Directors order, after the proceedings have been reported to them. Should the circumstances warrant, the complaint shall be referred to the Board of Directors with all evidence taken before the Committee, and the Board, after investigating said charges, shall summon before it the accused member where he shall have an opportunity to be again heard in person before final action in the case, and, if in the opinion of the Board, the charge or charges against said accused member be substantiated, it may by a vote of not less than two-thirds of the entire Board, censure, fine, suspend or expel said member, and the decision of the Board of Directors shall be conclusive and final.

SECTION 5. TERM OF COMMITTEES. All standing committees shall be appointed for a term of one year, and shall remain in office until successors are appointed, or until vacated or voided by the Board of Directors.

Except as to the Administrative Committee the membership of Committees shall consist exclusively of members of the Society.

SECTION 6. CLASSIFICATION COMMITTEE. There shall be two Classification Committees for the allotment of royalties—one for the classification of "Music Publisher" members and one for the classification of "Composer and Author" members. The Classification Committee for the Music Publisher Members shall consist of the publisher members of the Board of Directors, and the Classification Committee for the composer and author of members shall consist of the composer and author members of the Board of Directors.

Each such committee shall meet not less than once in each quarter for the purpose of classifying the members over which it shall have jurisdiction.

It shall be the duty of the Classification Committee to determine the status of each member of the Society with respect to the share of the royalties to which he is entitled in the distribution of royalties directed to be made by the Board of Directors. Such Committees, in fixing the status of a member shall take into consideration the number, nature and character of works composed, written or published by such member, the popularity and vogue of such works, the length of time in which the works of the member have been a part of the catalogue of the Society and generally the prestige, reputation, qualifications, standing and service which such member has rendered to the

Society. Such Committee shall, as soon as practicable, investigate and revise the classification of the respective members, to the end that the allotment and apportionment of the royalties among the respective members shall be fair, just and equitable to the entire membership.

The Classification Committee shall create several classes, each such class to consist of a group of members having a like status; each member of such group to share equally in the distribution of royalties with the other members of such group. The Committees shall diligently and industriously make due and proper investigation, before each distribution, of the members' standing and advance or reduce a member, as the case may be, from one class to another as the facts and circumstances may warrant, based upon the standards hereinabove set forth.

Protest and Appeal from Classification

Any member, aggrieved by his classification may, after any distribution, file a protest in writing with the Classification Committee having jurisdiction over his classification. It shall be the duty of the Classification Committee to hear such member and to accept from him all papers in evidence submitted to the Committee. The Committee shall have the power to make rules respecting hearings upon such protests, with full power to appoint a sub-committee to investigate such protest.

The Committee shall make its decision within thirty days from the date of filing the protest. The member shall have the right to appeal from such decision to the Board of Directors by filing a notice of appeal in writing with the Secretary of the Society, in which case the protest, with all evidence taken before the Committee shall be referred to the Board of Directors. The Board, after investigating such protest, shall determine the classification of such member by a vote of not less than two-thirds of the directors present. The decision of the Board of Directors shall be conclusive and final. In case of a reclassification of a member, such reclassification shall not be retroactive but shall become effective on the succeeding distribution.

Writers' Board of Appeals

In addition to the composer and author Classification Committee, ther shall be elected annually from the general membership (publisher members not voting) three committees, each to consist of three members, one committee of popular song composers and authors, one committee of production composers and authors, and one committee of standard composers and authors; these three committees shall constitute a composer and author board of appeals of nine men, and the personnel of said committees shall be made up as follows:

The Secretary of the Society shall, prior to ninety (90) days before the annual meeting, mail to the class AA members in the popular and production groups, a complete alphabetical list of all Class AA composer and author members of each group and to all standard members a complete alphabetical list of all Class AA composer and author members to BB (inclusive), without disclosing the classification of any of those whose names appear on the list; he shall at the same time mail to Class A through B (inclusive), members in the popular and production groups, a complete and alphabetical list of all Class A through B members and each of these respective groups without disclosing the classification of any of the members whose names appear on the list; he shall, at the same time, mail to the standard and composer groups from Classes B through C (inclusive), without disclosing the classification of any of the members whose names appear on the list; he shall, at the same time, mail to Class CC through 3 (inclusive), members in the popular and production groups, a complete and alphabetical list of all Class CC through 3 (inclusive), members of each of these groups without disclosing the classification of any of the members whose names appear on the list, and mail to the standard group classes DD through 3, a complete alphabetical list of members of these groups without disclosing the classification of any of the members whose names appear on the list.

The members of each group shall vote to elect one member of said group to each of the three committees constituting the composer and author board of appeals; the person receiving the greatest number of votes in his respective group shall be deemed to be elected to said board of appeals; in the event such member is not available for service, then the person in the same group receiving the next greatest number of votes shall automatically take the place of the absentee as an alternate member of the Board of Appeals.

These nine men so elected shall constitute the Board of Appeals, and said Board shall consist of the following three committees taken from the following groups of classification:

1 member on the Popular Writers' Committee from Class AA.

1 member on the Popular Writers' Committee from Class [illegible].
1 member on the Production Writers' Committee from Class AA.
1 member on the Production Writers' Committee from Classes A through B (inclusive).
1 member on the Production Writers' Committee from Classes CC through 3 (inclusive).
1 member on the Standard Writers' Committee from Classes AA through BB (inclusive).
1 member on the Standard Writers' Committee from Classes B through C (inclusive).
1 member on the Standard Writers' Committee from Classes DD through 3 (inclusive).

The procedure on appeals shall be as follows:

Any member who is dissatisfied with the decision of the Classification Committee may give notice in writing to the Secretary that he proposes to appeal to the Committee on the Board of Appeals which represents his particular group (popular, production or standard), the said Committee shall entertain his appeal and give him an opportunity to appear in person, if he so desires, or to present his appeal in writing, or both; if the said Committee decides against the member, its decision shall be deemed final; if said Committee decides in favor of the member, its decision shall likewise be deemed final, unless the Classification Committee feels that it is to the interest and welfare of the Society that a further appeal be allowed; in such case, the Classification Committee shall so state in writing, and an appeal may thereupon be taken by the Classification Committee, itself, to the entire Board of Appeals of the composers and authors, consisting of nine members; such appeal may be presented in writing or by oral hearing, or both; the decision of such Board of Appeals shall be considered final.

Members shall be given not less than five (5) days notice of the date when their appeal will be heard.

Appeals shall be heard in regular order, and the Board of Appeals shall meet at least once every three months, and until all appeals have been heard.

A majority vote of the Board of Appeals shall rule.

If a member of the Board of Appeals is dissatisfied with his classification and desires to make an appeal, he shall first do so to the Classification Committee and if not satisfied with its decision, then he shall have the right to appeal to the entire Board of Directors of the Society, whose decision shall be final.

The Classification Committee shall delegate one of its members to be at the disposal of the said Board of Appeals at all times with the necessary data, cards and other information required, and shall supply all information required to said Board of Appeals whenever so requested; the counting and tally of ballots of election shall be under the direction and supervision of the General Manager and President of the Society; the election of the members of the Committees and Board of Appeals of the Composers and Authors, shall take place at least one month prior to the annual meeting of the Society, and the results thereof shall be announced at the annual meeting of the Society, each year, except that the first election shall take place not more than two (2) weeks after the passing of this amendment by the general body.

The decisions of the Board of Appeals, with respect to the proper classification of members, shall not be retroactive.

The Board of Directors of the Society shall make the rules of procedure by which the Board of Appeals shall be governed.

If any member of the Board of Appeals is advanced out of the class and group from which he is elected, then he shall immediately be replaced by his alternate in that particular class and group.

No member elected to serve on the Board of Directors of the Society shall be eligible to serve on the Board of Appeals.

The Board of Appeals must at all times adhere to the rules and regulations of classification as contained in the Articles of Association of the American Society of Composers, Authors and Publishers, under Article XIV, Section 6, and at all times take into consideration all data, etc., which from time to time are used by the Classification Committee in arriving at the just classification of members.

The Board of Directors shall, at its first regular meeting after this amendment is passed and put into effect, fix proper compensation to be paid to the members of the Board of Appeals, at such times as they are required to hold meetings.

The foregoing provisions shall apply only to Author and Composer members of the Society, and not to Publisher members.

This amendment is to take effect immediately.

In addition to the Classification Committee for the music publisher members, there shall be elected annually from the general membership (composer and author members not voting) two separate committees of three members each, to be known respectively as the

(1) "Popular Publishers' Board of Appeals"

(2) "Standard Publishers' Board of Appeals"

and the personnel of each of said committee shall be selected as follows:

(1) The Secretary of the Society shall, prior to ninety (90) days before the Annual Meeting, mail to each and every publisher-member a complete alphabetical list of all publisher-members of the Society, without disclosing the classification of any of such members; he shall also at the same time send to each publisher-member a ballot.

(2) The publisher-member shall, prior to the Annual Meeting, fill out said ballot, each "Popular" publisher-member voting for three members of the "Popular Publishers' Board of Appeals"; and each "Standard" publisher-member voting for three members of the "Standard Publishers' Board of Appeals".

Each such ballot shall be returned by mail to the Society and shall be opened and inspected jointly by the President and General Manager of the Society who shall make a record of each vote. The three persons receiving the highest number of votes in each class shall be deemed elected the members of the indicated ("Popular" or "Standard") Publishers' Board of Appeals and the three persons in each class receiving the second highest number of votes shall be deemed to be alternates to serve in place of those elected in any case and under all circumstances and with the full powers of the duly elected incumbent in the event of his inability or refusal for any reason to serve.

(3) Appeals of "Popular" publisher-members may be presented to and considered by the "Popular Publishers' Board of Appeals" only, and appeals of "Standard" publisher-members may be presented to and considered by the "Standard Publishers' Board of Appeals" only.

(4) The Publishers' Board of Appeals shall meet only in the City of New York, and their respective procedure on appeals presented to them shall be as follows:

(a) Any publisher-member who is dissatisfied with the decison of the Publishers' Classification Committee, may give notice in writing to the Secretary that he proposes to appeal to the appropriate Publishers' Board of Appeals; the said Publishers' Board of Appeals shall entertain his appeal and give appellant an opportunity to appear in person, if he so desires; or to present his appeal in writing, or both; on such appeal a sub-committee appointed by the Publishers' Classification Committee may also appear and give evidence justifying its classification of said publisher member; if the said Publishers' Board of Appeals decides against the publisher-member, its decision shall be deemed final.

(b) If the said Publisher's Board of Appeals decides that the publisher-member has been improperly classified, said Board shall bring up such question for review before the Board of Directors as a whole, within thirty (30) days after the filing of the decision of the Board of Appeals and the Board of Directors shall proceed with the question in the manner provided for by these Articles of Association, and the decision of the Board of Directors shall be final.

(c) No member of the Publishers' Classification Committee nor of the Board of Directors shall be eligible to serve as a member of either Publishers' Board of Appeals, nor shall there be eligible to membership on said Board, more than one individual representative of a firm of publishers; such member is to be designated by the firm or corporation publisher-member and his name placed on file with the Secretary of the Society, prior to the annual vote; the expression—"Firm of Publishers" shall include not only publisher-members, corporate, partnership or individual, but all firms, whether corporate, partnership or individual allied with or subsidiary to such publisher-member. If a member of either Board of Appeals is dissatisfied with his classification and desires to make an appeal, he shall first do so to the Publishers' Classification Committee, and if not satisfied with its decision, then he shall have the right to appeal to the entire Board of Directors of the Society, whose decision shall be final.

(d) A majority of the Board of Appeals shall rule; publisher-members shall be given not less than ten (10) days' notice of the date when their appeal will be heard; appeals shall be heard in regular order.

(e) The Publishers' Classification Committee shall delegate at least one of its members to be at the disposal of the said Publishers' Board of Appeals at all times with the necessary data, cards and other information required, and shall supply all information required to said Publishers' Board of Appeals whenever so requested.

tions of classification as contained in the Articles of Association of the American Society of Composers, Authors and Publishers under Article XIV, Section 6, and must at all times take into consideration all data, etc., which from time to time are used by the Publishers' Classification Committee in arriving at the just classification of members.

(g) The Board of Directors shall at its first regular meeting after this amendment is passed and put into effect, fix proper compensation to be paid to the members of the Publishers' Board of Appeals at such times as they are required to hold hearings.

(h) The General Manager shall, within ten (10) days after the adoption of this amendment send to each publisher-member a form upon which the said member shall be required to indicate into which class of membership, "Popular" or "Standard" he desires to be registered. Upon registration in such class a member may vote as provided in Paragraph 2 above only for members of the Publishers' Board Appeals of the Class indicated.

Any appeal brought by such member shall be considered only by the Board of Appeals functioning in respect to that class. However, a member desiring to change his class may do so upon request in writing addressed to the Secretary of the Society and approval of such request by the Board of Directors.

(i) The foregoing provisions shall apply only to publisher-members, and not to author and composer members of the Society.

This amendment to take effect immediately.

SECTION 7. RELIEF COMMITTEE. There shall be a Relief Committee of three Directors, appointed by the President, consisting of one publisher, one author and one composer, who shall investigate requests or applications for relief on behalf of a sick, infirm, needy or deserving member or his widow, infant children or indigent parent. Upon the recommendation of such Committee the Board may direct the payment of such sum or sums as in its judgment will satisfy the immediate necessities of such person or persons, and to make advances, from any royalties thereafter to accrue to the member, such advances to be repaid to the Society by deducting the whole or any part thereof from any subsequent distributions awarded to such member.

The Board of Directors shall annually devote a part of the proceeds derived from its operations to the purpose of giving financial aid to members of the Society, their widows, infant children or indigent parents. The giving of such assistance is optional and shall only be granted in cases of urgent necessity, and the Society does not vouchsafe to its members the right to receive assistance. Any moneys paid out on account of relief must always be entered in the books of the Society with a statement of the actual purpose for which they were disbursed, and not merely under the head of "Relief."

Article XV

Apportionment of Royalties

SECTION 1. All royalties and license fees collected by the Society shall be from time to time as ordered by the Board of Directors distributed among its members, provided, however:

(a) That all expenses of operation of the Society and sums payable to foreign affiliated Societies shall be deducted therefrom and duly paid; and

(b) That the Board of Directors, by two-thirds vote of those present at any regular meeting may add to the Reserve Fund any portion not exceeding 10% of the total amount available for distribution; and

(c) That the net amount remaining after such deduction for distribution shall be apportioned as follows: one-half (½) thereof to be distributed among the "Music Publisher" members, and one-half (½) among the "Composer and Author" members respectively.

Reserve Fund

SECTION 2. The Board of Directors, by a two-thirds vote of all those present, shall have the right to create and from time to time to add to the reserve fund, and may direct that a portion of the royalties as and when collected be placed in such reserve fund.

Unclaimed Royalties

SECTION 3. Royalties which have been apportioned and which have not been claimed by the owners shall remain in the General Fund of the Society for a period of six years. Three months prior to the expiration of said six years, notices shall be given to the parties lawfully entitled thereto, by registered mail, requiring them to receive said royalties within three months, and after the expiration of said three months, such royalties, if not claimed, shall become the absolute property of the Society.

General Powers and Duties of Committees

Quorum of Committees

SECTION 1. A majority of each committee shall constitute a quorum thereof.

Meetings of Committees

SECTION 2. Each Committee, unless otherwise voted by the Committee, shall meet at least monthly upon a date to be fixed by the Committee, except during the months of July, August and September. The Secretary shall send notices of each meeting to the members thereof at least three days in advance of the meeting.

Absence of Member of Committee

SECTION 3. If any member of any Committee is absent from two successive meetings without an excuse presented to the Committee, his place may be declared vacant by the President.

Minutes of Committee

SECTION 4. The standing committees shall keep regular minutes of their transactions and cause them to be recorded in a book kept in the office of the Society for that purpose, and report the same to the Board of Directors at its regular meetings.

Article XVII

Special Committee

Whenever any twenty-five members of the Society shall certify to the Board of Directors that they desire the Society to prosecute any matter within the scope of the Society, the President shall appoint a special committee to investigate the matter and report to the Board of Directors with its opinion thereon whether it is advantageous and for the best interest of the Society to undertake the prosecution of such matter. The Board of Directors shall carefully consider such report and a two-thirds vote of all the directors shall determine whether or not such prosecution shall be undertaken.

Article XVIII

General Meetings of the Society

SECTION 1. The General Annual Meeting shall be held each year during the month of March. An additional General Membership Meeting shall be held in the month of October of each year. Special meetings may be called at any time by the Board of Directors.

Business Transacted at General Meetings

SECTION 2. No business shall be submitted to the General Annual Meeting, unless it has been brought to the knowledge of the Board of Directors at least eight days in advance. The General Annual Meeting shall, however, be entitled in any event to lay aside any such business as it may consider inopportune.

Motion or Resolution in Writing

SECTION 3. Every motion or resolution which shall be made or offered at any meeting of the Society shall, at the request of the Secretary, be reduced to writing and furnished to the Secretary before the question shall be put.

Article XIX

Notices

SECTION 1. Whenever notice is required to be given to any member, such notice shall not be required to be given by personal service, but such notice shall be deemed to have been given from and at the time when said notice in writing shall have been deposited in the Post Office, or in any regular United States mailing box in the City of New York, enclosed in a post-paid wrapper, addressed to the member at his last known place of residence, as the same shall appear upon the books of the Society, or if such address shall not appear upon the books of the Society, then to such address as may appear in any directory of the municipality in which he may reside or do business.

Expulsion and Termination of Rights of Membership
Suspension for Cause

SECTION 1. Any member who is expelled by the Board of Directors, or who is dropped for the non-payment of dues, fines or assessments, shall thereupon lose and forfeit any and all interest, right or claim in, to or under the Society, the property thereof, and the dues and assessments paid thereto. Upon expulsion, death, bankruptcy, insolvency or other severance of membership in or connection with the Society, all rights and interest of whatsoever character, sort or kind, to, of, in or concerning the Society by virtue of such membership, shall instantly cease and be of no further force and effect. Expulsion shall not relieve any member from his obligations to the Society up to the date of such expulsion.

Posthumous Membership

SECTION 2. On the death of any member his rights in the Society and membership shall cease, and neither his rights nor his membership nor any right therein shall at any time be, by voluntary assignment, operation of law, legal proceedings or otherwise, vested in any other person whomsoever; provided, however,

That in the sole discretion of the Board of Directors the heir, heirs, or next of kin of a deceased member may be awarded a share in royalty distributions not exceeding that which would, in the judgment of the proper Classification Committee, have been awarded to the deceased member had he been living at the time of such royalty distribution.

Bankruptcy of Member

SECTION 3. The Board of Directors shall have the right to suspend payments of royalties to any member in case of the filing of a petition in bankruptcy by or against him, and/or the adjudication of such member a bankrupt, or the execution by such member of an assignment for the benefit of creditors, or the taking advantage by him of the insolvency laws of any State, Territory or Country, or the appointment of a receiver, trustee or liquidator of the assets and property of the member, or the voluntary or involuntary dissolution of a member.

The representative of any member of "Music Publishers" class who shall be a member of the Board of Directors shall immediately upon the happening of any such contingencies be dropped from the Board of Directors.

The royalties, or the right to participate in the royalties, and the rights of the members in the Society, shall not be sold or otherwise disposed of by any member, and shall not be the subject of sale or other disposition by voluntary action, operation of law, legal proceedings or otherwise, and no member shall sell, otherwise dispose of, hypothecate or create a lien upon any royalties accruing, or that may thereafter accrue to him, by virtue of his membership, or any of the rights, privileges, benefits, royalties or emoluments to which he may be entitled by virtue of his membership.

Article XXI

Amendments

These Articles may be amended by a vote of two-thirds of the members present at any meeting of the Society held for the purpose of voting on such amendment.

In the House. By Mr. Knapp.

House Bill No. 480

STATE OF WASHINGTON, TWENTY-FIFTH REGULAR SESSION.

Read first time February 11, 1937, ordered printed and referred to Judiciary Committee.

AN ACT

In aid of the Federal Copyright Laws, to assist in effectuating their true intent and their enforcement in the State of Washington by removing and declaring illegal certain monopolistic abuses and activities wrongfully practiced under the guise of copyrights within the state by price fixing combinations, monopolies, and pools; to enforce the Washington constitutional provisions prohibiting price fixing monopolies and combinations in restraint of commerce and trade; providing penalties for combining rights granted by the copyright laws where the effect of such combination results in the use of copyright privileges as instrumentalities of oppression and extortion within the state in violation of constitutional provisions; and encouraging the rendition, creation and production of copyrighted works among the school children and citizens of the State of Washington; encouraging the marketing and acceptance of copyrighted works, created by the citizens of this state; repealing certain acts; creating a State Anti-Monopoly Board for a particular function to be exercised only in the event of abuses and violations hereof; defining its duties, and the jurisdiction and duties of courts of record, the duties of the prosecuting attorneys, county auditors, the state treasurer and the secretary of state; and providing for the appointment of a receiver in certain instances; defining certain terms; providing for service of process on non-residents; prohibiting certain acts; and providing penalties for violation hereof and repealing section 2690 of Remington's Revised Statutes.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. Section 2690 of Remington's Revised Statutes is hereby repealed.

SEC. 2. It shall be unlawful for any person who, without the consent of the owner thereof, shall cause to be publicly performed for profit any dramatic composition, or dramatic musical composition commonly called an opera, or other copyrighted works, or any substantial part thereof, which has been copyrighted under the laws of the United States, or for any person to knowingly participate in the performance or representation of any substantial part thereof, or by knowingly selling a substantial copy of any substantial part thereof.

SEC. 3. It shall be unlawful for two or more persons holding or claiming separate copyrighted works under the copyright laws of the United States, either within or without the state, to band together, or to pool their interests for the purpose of fixing the prices on

the use of said copyrighted works, or to pool their separate interests or to conspire, federate, or join together, for the purpose of collecting fees in this state, or to issue blanket licenses in this state, for the right to commercially use or perform publicly their separate copyrighted works: *Provided, however,* Such persons may join together if they issue licenses on rates assessed on a per piece system of usage: *Provided, further,* This act shall not apply to any one individual author or composer or copyright holder or owner who may demand any price or fee he or she may choose for the right to use or publicly perform his or her individual copyrighted work or works: *Provided, further,* Such per piece system of licensing must not be in excess of any per piece system in operation in other states where any group or persons affected by this act does business, and all groups and persons affected by this act, are prohibited from discriminating against the citizens of this state by charging higher and more inequitable rates per piece for music licenses in this state than in other states: *Provided further,* Where the owner, holder, or person having control of any copyrighted work has sold the right to the single use of said copyrighted work, where its sole value is in its use for public performance for profit, and has received any consideration therefor, either within or without the state, then said person or persons shall be deemed to have sold and parted with the right to further restrict the use of said copyrighted work or works.

SEC. 4. In the event two or more persons holding separate copyrighted musical works, or any rights flowing therefrom, whether by assignment, agency agreements, or by any form of agreement, pool their interests, or combine, or conspire, federate, or join together in any way, whether for a lawful purpose or otherwise, a complete list of their copyrighted works or compositions shall be filed once each year in the office of the secretary of state of the State of Washington, together with a list of the prices charged or demanded for their various copyrighted works; no payment or filing fee shall be required by the secretary of state, and said persons, corporations, or association, foreign or domestic, shall state therein under oath, that said list is a complete catalogue of the titles of their claimed compositions, whether musical or dramatic or of any other classification, and in addition to stating the name and title of the copyrighted work it shall recite therein the date each separate work was copyrighted, and the name of the author, the date or its assignment, if any, or the date of the assignment of any interest therein, if any, and the name of the publisher, the name of the present owner, together with the addresses and residences of all parties who have at any time had any interest in such copyrighted work. The secretary of state shall require two copies of said list, one of which he shall keep on file, the other shall be forwarded to the offices of the state treasurer at Olympia.

SEC. 5. The foregoing list of names and titles, provided for in the preceding section, shall be made available by the secretary of state to all persons for examination, in order that any user of copyrighted works in this state may know the rights and the titles to such copyrighted works as may be claimed by any of said combinations, pools, associations, or persons as aforesaid; said lists shall be prepared so that all persons may avoid using said copyrighted compositions, if they so desire, and may avoid conflict therewith, and avoid committing innocent infringements of said works; and in order to further effectuate the copyright laws of the United States, the secretary of state shall, if he deems it necessary to protect the citizens of this state from committing innocent violations of the copyright

laws of the United States, publish such list once each year in a newspaper of general circulation, in order that all citizens of the state may respect any and all individual rights granted by the United States copyright laws.

SEC. 6. No person, corporation, or association, domestic or foreign, whether doing business in this state as hereinafter defined or not, shall be absolved from the foregoing duty of filing said list of holdings as required in the preceding sections of this act, if their music or copyrighted works are used commercially in this state, or have been used herein, whether originating from a point within the state or from without, and as long as any rendition thereof is received or heard within the state, or is intended to be so received by the originator of any musical program: *Provided, however,* Any individual owner of a copyrighted work or works, not a party to or not connected in any way with any pool, conspiracy, combination, or groups, or association of persons, as prohibited by this act, need not file any such list.

SEC. 7. It is hereby declared that the production and creation of music and the commercial use of music and of copyrighted works within this state, whether originating at a point from within or without the state, as long as the same shall be rendered and publicly received within the confines of this state, whether mechanically or by radio communication, is a business clothed and affected with the public interest, and the adult educational advantages engendered by the public use of music and in its creation, makes this business one of public necessity, and necessary for the education and training of the youth of this state; that many abuses are practiced under a false guise of federal protection which only the state with its police power can easily and lawfully restrain, and in order to prohibit, discourage, and prevent monopolistic practices, and to prevent extortion, to encourage free bargaining between the citizens of this state with each other and with those without the state, and in order to give greater effect to the constitutional provisions relating to monopoly and price-fixing, and in the general interest of the public, therefore, the legislature in the interest of the peace and dignity of the state, in the interest of good morals and the general welfare of the people of this state, and for greater educational advantages to the public, declares that said business shall be subject to the police power and reasonable regulation of the state government, and such police and regulating power shall be administered by the courts and other officials of this state in a manner consistent with, in aid of, and never in conflict with, the copyright laws of the United States. The provisions of this act, and the administration thereof, shall at all times effectuate the enforcement, the true intent, and meaning of the United States copyright laws in order to prevent abuses from being practiced within this state from points within or from points without the state, by any individual, corporation, or organizations, who attempt to use the federal courts as innocent instrumentalities in the furtherance of any systematic campaign or scheme designed to illegally fix prices for the commercial use of copyrighted works in this state through the use of extortionate means and terrorizing practices based on threats of suits, and an abuse of both state and federal process, all of which are declared to be in violation of this act and of the state constitution; it is further declared that any person or persons, or combines, as aforesaid, who shall violate this act shall be deemed to have used their property within this state in such a way that the same shall have acquired a legal situs, analogous to the situs of other personal tangible property within the state, even though

separate from the domicile and residence of the owner: *Provided, further,* The legal situs of any copyrighted work is co-extensive about the state, and a copyrighted work used or sold for public use or public performance for profit, if intended to be heard from a point without the state or from a point within the state, is hereby declared to be a commercial commodity, and its legal situs is hereby declared to be within the State of Washington.

SEC. 8. All persons, groups, corporations, associations, foreign or domestic, violating this chapter, shall be deemed to have been doing business within this state and amenable to the process of the state courts, when any such persons, combinations, or groups shall have issued licenses, either from within or from without the state, for the privilege of using commercially and publicly any copyrighted work or works pooled in a common group or entity, or when any of the functions of said entity, organization, pool, or combine, is or has been performed in this state; and the business of spying upon and the warning of users of the copyrighted works of such combinations, in addition to the presence within the state of such persons, and the activities of such persons or their agents at any time or occasion for the detection of infringements within this state, shall be conclusive evidence that such combinations and persons, even though non-residents, have accepted the privileges of doing business within this state, and such persons, if they abide by the provisions of this act, shall be granted the privilege of conducting business within this state in a legal manner, and may invoke the benefits of the state government and its political subdivisions in their behalf, and they may use all of the privileges available to the citizens of this state in general, and the use at any time of any general privilege available to any citizen of this state, by any of such agents, their attorneys, or representative, or investigator, or by any aider and abettor, or any non-resident person, group, entity, or combination as aforesaid, shall be deemed to be an acceptance of the provisions of this act; and all licensees of any violator of this act shall be deemed as aiders and abettors of said persons and subject to the provisions of this act unless they forthwith indicate their obedience herewith; and the acceptance of the general privileges of the State of Washington by any non-resident copyright holder or owner, or combination, defendant, or person, or organization of any kind, or entity, through an investigator, attorney, agent, representative, or through any aider and abettor as herein defined, and the acceptance by such persons of the rights, police protection, or of any general privilege conferred by the law of this state to any of its citizens, including the use of the roads and highways, or the privileges of any of its political subdivisions, as evidenced by their presence within the state at any time, shall be deemed equivalent to and construed to be an appointment by such non-resident or non-residents, as the case may be, of the secretary of state of the State of Washington to be his or their true and lawful attorney upon whom may be served all summons and processes against him or them and growing out of a violation of this act, in which said non-resident may be involved, and said acceptance of the privileges of this state, as aforesaid, shall be a signification of his or their agreement that any summons or process against him or them which is so served shall be of the same legal force and validity as if served on him or them personally within the State of Washington. Service of such summons or process shall be made by leaving a copy thereof with a fee of two dollars ($2) with the secretary of the State of Washington, or in his office, and such service shall

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be sufficient and valid personal service upon any such non-resident defendant, copyright holder or owner, persons, or defendants, combination, entity, or organization, as aforesaid: *Provided*, That notice of such service and a copy of the summons of process shall be forthwith sent by registered mail requiring personal delivery, by the prosecutor bringing any action under this act, to any defendant at his last known address, and the defendants return receipt and the prosecutor's affidavit of compliance herewith are appended to the process and entered as a part of the return thereof: *Provided, further*, The court in which any action is brought may order such continuances as may be necessary to afford any non-resident defendant or groups, or entity, a reasonable opportunity to defend the action: *Provided, further*, The secretary of state shall keep a record of all such summons and process which shall show the day and time of service; and valid personal service shall thus be had on non-resident persons or individuals, entities, firms, or corporations violating this act.

SEC. 9. In the event any person, or groups of persons, or any combination or pool as aforesaid, whether a non-resident corporation, person, or an association, or domestic, refuse to abide by the provisions hereof, or attempt to evade or render ineffectual the true enforcement of any provision of this act, then the prosecuting attorney of any county where complaint is made of any violation, shall institute injunction proceedings against said persons in the superior court, and valid personal service may be had upon any non-resident defendant as set forth in the preceding section; and the court shall enjoin all persons from violating the provisions of this act and the constitutional provisions prohibiting price fixing, monopolies, and combinations, and all copyrighted works and the public performance rights thereto when sold or used for profit are hereby declared to be a commercial commodity, and all persons, aiders and abettors, and agents, shall be enjoined by the court from aiding or furthering in any way a continuation of any violation of this act, either by the payment of money to said defendants or in any way; and if any defendant or defendants persist in defying the judgment of the court, the court shall, in order to effectuate its judgment and orders, order three (3) days' notice be given said defendant or defendants, as the case may be, by having a copy of such notice served on the secretary of state as heretofore provided if defendants are without the state, or served personally if within the state, and have the same published in some daily paper in the state of general circulation, and at the end of said period, if any defendant or defendants refuse to obey the order of the court, then the court shall appoint the county auditor as receiver for the copyrighted works and property of defendants, tangible or intangible, and of all other effects and monies derived therefrom, and the receiver shall take over and preserve the commercial rights to all of said copyrighted works, together with such other property of any defendant, combination, pool, corporation, or entity through which they are acting, that he can locate within the state, and the receiver shall administer the same under the direction of the court, and said receivership shall be considered only as an incident to the main injunction suit of the prosecutor, and for the purpose of enforcing the courts orders; the said receiver shall seize the copyrighted works of all of the copyright holders and owners in said defendant combination, including all of the rights to suits for infringement and damages in both state and federal courts, and all choses of action and all sums due on contracts and licenses, and hold the same subject to the order of the court; and all persons

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holding licenses or contracts with any defendant combination or entity, shall pay the fees and sums due thereon to the receiver for such time as the court may need to effectuate the provisions of this act, and to compel any defendant to abide herewith: *Provided,* Any sums paid on licenses violating this act shall only be continued in the courts discretion or until such time as the court can award defendants complete and full due process of law before entering a final order thereon, or until such time as a legal and equitable system of licensing can be determined according to the subsequent provisions of this act: *Provided further,* In the event any defendant or defendants attempt to withdraw their said copyright works or property from the state in order to violate and render this act or the courts orders ineffectual, or to deprive the citizens of this state of such commodity, or to hamper the enforcement of any provision of this act, or to injure any citizen or user of music in any way, then the court shall immediately order the receiver to compile a complete list of all of the copyrighted works of said defendants which have been used in this state, and the court shall then convene the State Anti-Monopoly Board, as herein now created, consisting of the state treasurer and the state auditor, and said board shall meet in the county where the suit is filed, and the superior judge hearing the cause shall be an advisory member of said board; and said board, of which the state treasurer shall be chairman, shall have only one function, the discouragement of price-fixing and monopolies, and the court shall then submit to said board the single question of the establishment of license rates for the use of those copyrighted works controlled by the defendants so proceeded against; and for the purpose of aiding in the abolition of monopolies and price-fixing, and preventing violations of this act, the board shall determine a fair and just rate that the receiver should charge for the single and separate public performance for profit of each copyrighted work or works of said defendants, on a per piece system and basis of licensing, and the court shall not be deemed thereby to have divested itself of any of its jurisdiction by so doing; after determining such rate, the said Anti-Monopoly Board shall immediately advise the receiver of its findings, and of its fair rate, and the same shall be filed of record in the cause, and the receiver may then, if said finding is approved by the court, issue licenses for the use of said music at such approved rate on a basis of so much money per each time a piece of music is played or used in a public performance for profit; that said property shall be thus administered by the receiver for a period of one year, or until such time as the defendants, or the individual copyright owners of any combination so proceeded against take oa that they will abide by the ruling of the court and the provisions of this act; and all fees and funds collected by the receiver shall be turned over to the state treasurer, and no receivers fees or attorneys fees shall be allowed, and the prosecuting attorney shall be the attorney for the receiver, and the state treasurer shall keep said money in a separate and special fund, subject to the order of the court only for whatever portion thereof that the court may order used to defray the actual expenses of the board and the receivership; at the end of one year, if the defendants and copyright owners or holders in any combination thus proceeded against, continue to wilfully disobey the courts orders, then the court shall issue an order, which shall be published in three public places, to the effect that unless the defendants obey all of the orders of the court within ten days from the date of said order, that the court will proceed to permanently deprive said defendants and each of them of their property; and the court shall then order said

defendants to show cause within ten days why they should not be involuntarily compelled to assign all of their copyrighted works to the receiver forthwith, and to show cause why all of the funds as collected in the manner aforesaid from licenses, together with all of the copyrighted works including the performing rights thereto of said defendants and members of said combine, should not escheat and be forfeited forever to the State of Washington, and be subject thereafter to administration by the state in the same manner as all other personal property belonging to the State of Washington; if any of said defendants and copyright holders, or owners, do appear before the end of said ten day period, and take oath that they will abide by the future orders of the court and the provisions of this act, then the court shall release their copyrighted works and order the state treasurer to return any and all of their money which has been received or seized: *Provided, however*, The court shall retain such jurisdiction over their persons for such time as the court may deem necessary to insure strict compliance with the terms of the courts judgment and the provisions of this act; if any of said defendants or copyright owners or holders shall ignore or refuse to obey the show cause order, aforesaid, or fail to appear at the end of ten days as ordered and abide by the courts judgment, then the court shall make an order and enter judgment to the effect that all of the copyrighted works, including the performing rights thereto, of said defendants and the members of any defendant combination, shall be construed as having been escheated and forfeited to the State of Washington, and the court shall thereupon appoint some officer of the court to execute an involuntary assignment of all the legal and equitable titles to all of the copyrighted works of each of said defendants and members of any defendant combination to the receiver, in the event the defendants or any of their members fail to execute a voluntary assignment, and the receiver shall immediately file said involuntary assignment at the United States Copyright Office at Washington, D. C.; and the court shall then order the receiver to close the estate, and turn the titles to said copyrighted works over by proper assignment from the receiver to the state treasurer of the State of Washington, who shall thereafter administer, issue licenses for the use of the same in a manner consistent with this act, and conserve the same as state personal property in his possession, and according to law; and any funds left in the state treasury from said receivership shall escheat and be forfeited to the state and become part of the general fund: *Provided, further*, The state treasurer shall make a report to the legislature on each biennium of the amount of money received from such licensing and the amount of property he has on hand through the enforcement of this act.

SEC. 10. That in the event any person, or any of the defendants, or non-residents, or non-resident copyright owners or holders, are proceeded against as herein outlined, and are served with process according to law, or any non-resident is served with process as outlined in the preceding sections of this act, and if any of said defendants, or persons, or aidors and abettors named as defendants, appear in any such proceeding by counsel or otherwise, or institute any special proceeding attacking such proceeding, or make any motion therein, either special or general, or if any of them appear to obtain the judgment of the court solely upon the sufficiency of the service of the process upon them, or upon any phase or particularity of said injunction proceedings, such special proceeding or appearance, or motion, or appearance, as the case may be, shall nevertheless be deemed as a general appearance even though the process may have been insufficient, and said parties and

defendants as may thus appear in the action, for any reason or cause, whether they seek special or affirmative relief, shall thereafter be subject to the general orders and jurisdiction of the court for all purposes, and if any of said defendants or persons appear in any court proceeding instituted to effectuate this act solely for the purpose of challenging the validity of service of process upon them they shall be deemed to have surrendered themselves and as having submitted to the general jurisdiction of the court: *Provided, however*, This section shall not be construed as denying, and no attempt shall be made at any time in any proceeding in connection with the enforcement of this act, to restrain or deny any of said defendants, resident or non-resident, copyright holders or owners, or any person, or members of any defendant combination, entity, pool, or monopoly of their rights or property without full and complete due process of law.

SEC. 11. Every person, in addition to the other penalties provided in this act, who violates or who procures, or aids or abets in the violating of any provision of this act, or who conspires to render ineffectual any valid order or decision of any court in the enforcement of this act, or who procures, conspires with, or aids or abets any person or persons in his or their failure to obey the provisions of this act, or to render ineffectual any valid order of any court in connection with the enforcement of this act shall be deemed guilty of a gross misdemeanor, and upon conviction, shall be punished by a fine not exceeding five hundred dollars ($500), or imprisonment in the county jail for not more than six months, or both such fine and imprisonment.

SEC. 12. In case any part or portion of this act shall be held unconstitutional, such holding shall not affect the validity of this act as a whole or any other part or portion of this act, and if any clause, sentence, paragraph, subdivision, section or part of this act shall for any reason be adjudged invalid, such judgment shall not affect, impair, or invalidate the remainder of the act, but shall be strictly confined in its operation and holding to the specific clause, sentence, paragraph, subdivision, section, or part thereof, directly involved in the controversy in which such judgment shall have been rendered; and all other acts and laws in conflict herewith are hereby repealed.

SEC. 13. In the event more than one injunction suit provided for in this act is instituted in this state, in different counties by different prosecuting attorneys, but against the same defendants, the respective superior judges hearing the causes may issue orders against said defendants in any county, but in the event any of the various county proceedings enter into the stage of receivership, as herein provided, then the judges hearing the respective causes shall order those causes where the defendants are the same, to be consolidated in one action in one particular county, and in such county as the judges may decide, to the end that only one receiver may be appointed for the entire state for the property of the same defendant or defendants.

Exhibit "F"

Original
OPERATOR'S BROADCASTING LICENSE

No.: WASH.—4

Call: K.M.O.

MEMORANDUM OF AGREEMENT between AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, (hereinafter styled "SOCIETY"), and K.M.O. INC. (hereinafter styled "LICENSEE"), as follows:

1. SOCIETY grants to LICENSEE, its successors and assigns, and LICENSEE accepts for a period of five (5) years from January 1, 1936, a license to publicly perform by broadcasting from Radio Station K.M.O. located at Hotel Winthrop, Tacoma, Washington, non-dramatic renditions of the separate musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY, or of which SOCIETY shall have the right to license such performing rights.

2. The within license does not extend to or include the public performance by broadcasting or otherwise of any rendition or performance of any opera, operetta, musical comedy, play or like production, as such, in whole or in part.

3. Nothing herein contained shall be construed as authorizing LICENSEE to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever, any of the musical compositions coming within the purview of the within license performed pursuant hereto, or as authorizing any receiver of any such broadcast rendition to publicly perform or reproduce the same for profit by any means, method or process whatsoever.

4. The within license is strictly limited to the separate musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY, or of which SOCIETY shall have the right to license the performing rights hereinbefore granted, in programs rendered at or from said radio station, or at or from any other place duly licensed by SOCIETY to perform such works (unless the performance originates at a place or from a source which SOCIETY does not customarily license), from which place rendition of such works is transmitted to said radio station for the purpose of being broadcast therefrom.

It is understood, however, that LICENSEE shall be guilty of a breach under this Article (No. 4) only in the event that it continues to broadcast a program rendered at such places other than the said station after LICENSEE shall have received notice from SOCIETY that such other places are not licensed by SOCIETY to perform.

5. The within license is granted upon the express condition:

(a) That should the power input as at present authorized by the Federal Communications Commission for the said station (500 LS watts) be changed during the term hereof, the basic fee as provided in the first paragraph of Article No. 8 hereof shall be adjusted.

) That in event the license of said station from the Federal Communications Commission is terminated, cancelled, revoked or suspended, or in the event that radio broadcasting is supported from other sources or operated by other than private interests, than as now prevails, LICENSEE shall promptly notify SOCIETY thereof, and either SOCIETY or LICENSEE may then terminate this agreement; and in such event, LICENSEE shall be under no further liability to SOCIETY for the payment of any license fee hereunder; provided, however, that if the license of said station to broadcast is suspended for a period less than the term of the within license, then in such event LICENSEE shall be relieved from payment of the license fee hereunder only during such period of suspension.

6. LICENSEE agrees upon request to furnish to SOCIETY during the term of the within license a list of all musical compositions (or, at the option of LICENSEE, a list of all musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY or of which SOCIETY shall have the right to license the performing rights hereinbefore granted) broadcast from or through the said station, showing the title of each composition and the composer and/or author thereof; provided that LICENSEE shall not be obligated under this Article No. 6 to furnish such a list covering a period or periods in the aggregate during any one calendar year in excess of three months. The lists so furnished by LICENSEE to SOCIETY shall be strictly confidential and SOCIETY covenants that it will make no disclosure thereof or of the contents thereof.

7. In case there shall be a substantial diminution in the quantity of musical numbers, the performing rights of which are licensed under this agreement, then the LICENSEE shall have the right to terminate this license upon three days' notice by registered mail, addressed to the SOCIETY, and this right shall be the sole and exclusive remedy.

The SOCIETY reserves the right, at any time, and from time to time, to withdraw from the operation of this license, any musical number or numbers. Upon any such withdrawal the LICENSEE may immediately terminate this license by giving written notice of its election so to do to the SOCIETY.

In the event of any such termination of this License pursuant to Articles 5 and/or 7 hereof, the SOCIETY shall refund to the LICENSEE pro rata license fees, if any, paid for a period beyond the date of such termination.

8. Under the terms and conditions hereinabove set forth, LICENSEE agrees to pay to SOCIETY, as compensation for the within license, the sum of SEVEN HUNDRED FIFTY and 00/100 Dollars ($750.00) per annum, payable in equal monthly installments on or before the 10th of each month during the term hereof, plus

(a) A sum equal to five percent (5%) of the net receipts (as hereinafter defined) of the LICENSEE from the sale of its broadcasting facilities.

(b) The term "net receipts" from the sale of its broadcasting facilities shall refer to the full amount charged by and actually paid to LICENSEE for the use of its broadcasting facilities (sometimes known as "time on the air"), after deducting commissions not exceeding fifteen percent (15%), if any, paid to the advertising agent or agency (not employed or owned in whole or in part by LICENSEE).

LICENSEE shall render monthly statements to SOCIETY on or before the 10th of each month covering the period of the preceding calendar month on forms supplied gratis by SOCIETY, and shall include in such statements all net receipts, without exception, during the said month from the sale of the broadcasting facilities ("time on the air") of the said station, which said statement shall be rendered under oath and accompanied by the remittance due SOCIETY under the terms hereof. Any such statement may also include a deduction by or credit to the LICENSEE for any amount reported by it as received during a prior month from the sale of its broadcasting facilities but which it has been compelled to refund as a "time discount." In the event that any such item shall be collected after it has been credited or deducted as aforesaid, it shall then be included again in the net receipts of LICENSEE on the monthly statement next succeeding the date of the actual collection.

9. SOCIETY shall have the right, by its duly authorized representative, at any time during customary business hours, to examine the books and records of account of LICENSEE only to such extent as may be necessary to verify any such monthly statement of accounting as may be rendered pursuant hereto; provided that such examination does not interfere with the usual conduct of business by LICENSEE.

It is understood and agreed that SOCIETY shall consider all data and information coming to its attention as a result of any such examination of books and records as completely and entirely confidential.

10. Upon any breach or default of any terms herein contained, SOCIETY may give LICENSEE thirty (30) days notice in writing to repair or correct such breach or default and in the event that such breach or default has not been repaired or corrected within said thirty (30) days, SOCIETY may then forthwith cancel said license.

11. SOCIETY agrees to idenmify, save and hold LICENSEE harmless, and defend LICENSEE from and against any claim, demands, or suits that may be made or brought against the LICENSEE with respect to renditions given during the term hereof in accordance with this license of musical compositions contained in SOCIETY'S repertoire heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY.

In the event of the service upon LICENSEE of any notice, process, paper or pleading, under which a claim, demand or action is made or begun against LICENSEE on account of any such matter as is hereinabove referred to, LICENSEE shall forthwith give SOCIETY written notice thereof and simultaneously therewith deliver to SOCIETY any such notice, process, paper or pleading, or a copy thereof, and SOCIETY shall have sole and complete charge of the defense of any action or proceeding in which any such notice, process, paper or pleading is served. LICENSEE, however, shall have the right to engage counsel of its own, at its own expense, who may participate in the defense of any such action or proceeding and with whom counsel for SOCIETY shall co-operate. LICENSEE shall cooperate with SOCIETY in every way in the defense of any such action or proceeding, and in any appeals that may be taken from any judgments or orders entered therein, and shall execute all pleadings, bonds or other instruments, but at the sole expense of SOCIETY, that may be required in order properly to defend and resist any such action or proceeding, and properly to prosecute any appeals taken therein.

In the event of the service upon LICENSEE of any notice, process, paper or pleading, under which a claim, demand or action is made, or begun against LICENSEE on account of the rendition of any musical composition contained in the SOCIETY'S repertory but NOT heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY, SOCIETY agrees at the request of LICENSEE to cooperate with and assist LICENSEE in the defense of any such action or proceeding, and in any appeals that may be taken from any judgments or orders entered therein.

12. All notices required or permitted to be given by either of the parties to the other hereunder shall be duly and properly given if mailed to such other party by registered United States mail addressed to such other party at its main office for the transaction of business.

IN WITNESS WHEREOF, this agreement has been duly subscribed by SOCIETY and LICENSEE this 23rd day of June, 1936.

AMERICAN SOCIETY OF COMPOSERS
AUTHORS AND PUBLISHERS

By Herman Finkelstein

K. M. O.
Licensee.

By Carl E. Haymond
Pres

(THEATRES)

Exhibit "G"

MEMORANDUM OF AGREEMENT between AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (hereinafter styled "Society"), and D. & R. THEATRES CO. INC., (hereinafter styled "Licensee"), as follows:

1. Society grants and licensee accepts for a period of ONE YEAR commencing JANUARY 1, 1936 a license to publicly perform at D. & R. Theatre, Aberdeen, Washington, and not elsewhere, non-dramatic renditions of the separate musical compositions copyrighted by members of the Society.

2. This license is not assignable nor transferable by operation of law, devolution or otherwise, and is limited strictly to the Licensee and to the premises above named. The license fee herein provided to be paid is based upon the performance of such non-dramatic renditions for the entertainment solely of such persons as may be physically present on or in the premises described, and does not authorize the broadcasting by radio-telephone, transmission by wire or otherwise, of such performances or renditions to persons outside of such premises, and the same is hereby strictly prohibited unless consent of the Society in writing first be had.

3. This license shall not extend to or be deemed to include:

(a) Oratorios, chorals, operatic or dramatico-musical works (including plays with music, revues and ballets) in their entirety, or songs or other excerpts from operas or musical plays accompanied either by words, pantomime, dance, or visual representation of the work from which the music is taken; but fragments or instrumental selections from such works may be instrumentally rendered without words, dialogue, costume, accompanying dramatic action or scenic accessory, and unaccompanied by any stage action or visual representation (by motion picture or otherwise) of the work of which such music forms a part.

(b) Any work (or part thereof) whereof the stage presentation and singing rights are reserved.

4. Licensee warrants and represents to Society that the total seating capacity of the above named theatre is 1400 seats, upon which warranty and representation the license fee herein is fixed.

5. Society reserves the right at any time to withdraw from its repertory and from operation of this license, any musical work, and upon any such withdrawal Licensee may immediately cancel this agreement. Upon the termination of this agreement pursuant to any provision of this article "5", there shall be made to the Licensee a pro rata refund of any unearned license fees.

6. Licensee agrees, upon demand in writing of the Society, upon forms supplied by Society, whenever requested, to furnish a list of all music rendered at the premises hereby licensed, showing the title of each composition, and the publisher thereof.

7. Upon any breach or default of any term or condition herein contained Society may, upon notice in writing, cancel this license, and in event of such cancellation shall refund to Licensee any unearned fees paid in advance.

8. The parties hereto hereby agree that this agreement shall be deemed to be, and the same shall be, extended and renewed from year to year, unless either party, on or before thirty days next preceding the termination of any year, shall give notice in writing to the other by registered United States mail of the desire to terminate the same at the conclusion of such year.

9. Licensee agrees to pay Society for the license herein the sum of TWO HUNDRED TEN AND 00/100 Dollars ($210.00) annually, payable quarterly in advance.

IN WITNESS WHEREOF, this agreement has been duly subscribed and sealed by Society and Licensee this 4th day of August, 1936.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

By Herman Greenberg
Agent and Attorney in Fact

D. & R. THEATRES CO. INC.

By Grace Dolan Pres

(GENERAL)

Exhibit "H"

MEMORANDUM OF AGREEMENT between AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (hereinafter styled "Society"), and THE OLYMPIC INCORPORATED (hereinafter styled "Licensee"), as follows:

1. Society grants and licensee accepts for a period of ONE YEAR commencing JANUARY 1, 1936, a license to publicly perform at OLYMPIC HOTEL, Seattle, Washington, and not elsewhere, non-dramatic renditions of the separate musical compositions copyrighted by members of the Society.

2. This license is not assignable nor transferable by operation of law, devolution or otherwise, and is limited strictly to the Licensee and to the premises above named. The license fee herein provided to be paid is based upon the performance of such non-dramatic renditions for the entertainment solely of such persons as may be physically present on or in the premises described, and does not authorize the broadcasting by radio-telephone, transmission by wire or otherwise, of such performances or renditions to persons outside of such premises, and the same is hereby strictly prohibited unless consent of the Society in writing first be had.

3. This license shall not extend to or be deemed to include:

(a) Oratorios, choral, operatic or dramatico-musical works (including plays with music, revues and ballets) in their entirety, or songs or other excerpts from operas or musical plays accompanied either by words, pantomime, dance, or visual representation of the work from which the music is taken; but fragments or instrumental selections from such works may be instrumentally rendered without words, dialogue, costume, accompanying dramatic action or scenic accessory, and unaccompanied by any stage action or visual representation (by motion picture or otherwise) of the work of which such music forms a part.

(b) Any work (or part thereof) whereof the stage presentation and singing rights are reserved.

4. Society reserves the right at any time to withdraw from its repertory and from operation of this license, any musical work, and upon any such withdrawal Licensee may immediately cancel this agreement. Either party to this agreement may, at any time, upon giving to the other party thirty days' prior notice in writing by registered United States mail, terminate this agreement. Upon the termination of this agreement pursuant to any provision of this article "4", there shall be made to the Licensee a pro rata refund of any unearned license fees.

5. Licensee agrees, upon demand in writing of the Society, upon forms supplied by Society, whenever requested, to furnish a list of all music rendered at the premises hereby licensed, showing the title of each composition, and the publisher thereof.

6. Upon any breach or default of any term or condition herein contained Society may, upon notice in writing, cancel this license, and in event of such cancellation shall refund to Licensee any unearned fees paid in advance.

7. The parties hereto hereby agree that this agreement shall be deemed to be, and the same shall be, extended and renewed from year to year, unless either party, on or before thirty days next preceding the termination of any year, shall give notice in writing to the other by registered United States mail of the desire to terminate the same at the conclusion of such year.

8. Licensee agrees to pay Society for the license herein the sum of FOUR HUNDRED EIGHTY AND 00/100 Dollars ($480.00) annually, payable quarterly in advance.

IN WITNESS WHEREOF, this agreement has been duly subscribed and sealed by Society and Licensee this 21st day of July, 1936.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

By George A. Hoffman
Agent and Attorney in Fact

THE OLYMPIC INCORPORATED

By W Hull Vice President & Gen Mgr

[fol. 87]

EXHIBIT "I"

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THURSTON COUNTY

No. 16114

STATE OF WASHINGTON, ex Rel. G. W. HAMILTON, Attorney-General, Plaintiff,

vs.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, an Unincorporated Association et al., Defendants

Decree

Filed Superior Court, Thurston Co., Wash., June 8, 3:01 P. M., 1936. Ellis C. Ayer, Clerk, by Edwidge LaFond, Deputy.

This matter coming regularly on before the court for a hearing upon the petition of the defendant, American Society of Composers, Authors and Publishers, and all of the parties being present and represented by their attorneys; and the court having considered the files in said cause and having considered testimony offered at said hearing and the contents of the Petition which have not been denied, and having heard the arguments and advice of counsel, and being fully advised in the premises,

It Is Now Therefore Ordered, Adjudged and Decreed as follows:

1. The American Society of Composers, Authors and Publishers (hereinafter for brevity called the "Society"), a voluntary association of seven or more members, comprised exclusively of authors, composers and music publishers, was formed in the year 1914 under the laws of the State of New York, for the purpose of protecting and enforcing the so-called "small performing rights" of copyrighted musical works of such members, and to grant licenses to music users for the giving of public performances for profit of such works.

2. That since such formation, the Society has conducted its business, operations and activities in every State of the Union, as a central bureau for the issuance of licenses to music users for the public performance for profit of the works of its members, and through which performing rights of copyrighted musical works may be cleared, and such a bureau is necessary to protect the performing rights of authors, composers and music publishers, and is a convenience and necessity to the users of music in obtaining the performing rights.

[fol. 88] 3. That it is necessary for authors, composers and music publishers to belong to the Society to effectively enforce and protect the performing rights in their respective copyrighted works, and the Society is a convenience and a necessity to the users of music who will be considerably embarrassed, impeded, delayed and put to considerable expense if they had to deal separately with each piece of music performed and with each owner of the performing rights of each such piece.

4. That the Society was formed for lawful purposes and that the plan being used by the American Society of Composers, Authors & Publishers whereby licensing agreements are entered into between license users in the State of Washington and the American Society of Composers, Authors & Publishers, an unincorporated association, and wherein the defendant association acted as a clearing house in the representation of the copyright owners of said music, and as the same is being conducted, is approved as a working, feasible plan and is not violative of any of the laws of the State of Washington, or of the Constitution.

5. That the Society serves a beneficial and useful purpose as a clearing house through which users may obtain and clear performing rights in musical compositions.

6. The Receiver is hereby directed to collect all amounts due from contract license users up to and including the 31st day of December, 1935, save and except such users as have paid direct to the Society during said period, in respect of works of the present membership of the Society.

7. It is further ordered and the Receiver is hereby directed to turn over, assign, transfer and deliver to the

defendant Society all rights, goods, properties, assets, agreements, licenses, books, records, papers, documents, memoranda and accounts, of every name, nature, character or description whatsoever which came into his possession, custody or control by virtue of his appointment as such Receiver, or to which he became entitled by virtue of such appointment, save and except any moneys on hand and claims for money due to January 1, 1936 (less costs and disbursements and expenses of the receivership).

8. That all orders made herein, assigning, conveying, transferring to or vesting in the Receiver copyrights or rights in copyrights, are hereby vacated, set aside and annul-ed, and any and all such assignments of copyright or rights in copyrights are hereby canceled and annul-ed, and the Receiver is hereby directed and ordered to make, execute, acknowledge and deliver to the Society and to its members, in such form as may be necessary to carry out the purpose and intent of this order within five days of the entry of this decree, such papers and documents as may be required or necessary to reassign and retransfer unto the Society and its members all copyrights and rights therein claimed by the Receiver under such orders.

[fol. 89] 9. That any rights in the works of the members of the Society under any assignment, license or permit heretofore made, issued or granted by the Receiver, are hereby declared to be and shall be of no force, effect or validity beyond the 1st day of January 1936.

10. That the complaint herein be dismissed upon the merits.

11. It is further Ordered, Adjudged and Decreed that the Receiver, upon duly complying with the terms and conditions of this decree, shall be discharged and his bond exonerated.

Done in open court this 8th day of June, 1936.

(Signed) D. F. Wright, Judge.

[fol. 90-92] *Duly sworn to by Gene Buck. Jurat omitted in printing.*

[fol. 93] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR TEMPORARY INJUNCTION—Filed May 28, 1937

Comes now the above-named complainants, and upon their verified bill of complaint herein and the affidavits of Gene Buck, Walter S. Fischer, Gustave Schirmer, Saul H. Bornstein, Deems Taylor, Anne Paul Nevin and Ella Herbert Bartlett, duly verified, and filed in the office of the Clerk of this court, move the Court for a preliminary injunction, pendente lite, restraining the defendants, Otto [fol. 94] Case, as State Treasurer of the State of Washington, Cliff Yelle, as Auditor of the State of Washington, Ernest N. Hutchinson, as Secretary of the State of Washington, G. W. Hamilton, as Attorney General for the State of Washington, B. Gray Warner, as District Attorney of King County, State of Washington, Harry H. Johnston, as District Attorney of Pierce County, State of Washington, Ralph E. Foley, as District Attorney of Spokane County, State of Washington, A. W. Swanson, as District Attorney of Snohomish County, State of Washington, H. W. Covalt, as District Attorney of Whatcom County, State of Washington, Smith Troy, as District Attorney of Thurston County, State of Washingon, Paul O. Manley, as District Attorney of Grays Harbor County, State of Washington, John D. Evans, as District Attorney of Yakima County, State of Washington, Glenn L. Bean, as District Attorney of Walla Walla County, State of Washington, Sam M. Driver, as District Attorney of Chelan County, State of Washington, "John Doe" and "Richard Roe," from proceeding against the complainants and others similarly situated, their officers, employees or agents, by criminal prosecution, and restraining the defendants and each of them, from taking any steps to create or act as an anti-monopoly board, and from demanding a list of copyrights of musical works with complainants and others similarly situated, and from attempting to appoint or take any steps leading to the appointment of a receiver, and from attempting to seize, escheat or confiscate copyrights and choses in action of complainants and others similarly situated, and

from attempting to fix any fees or grant licenses on a per piece system or otherwise, on any of complainants' copy-
[fol. 95] righted musical works, and from attempting to collect any license fees on the copyrighted musical works of complainants and others similarly situated, and from interfering with all existing contracts entered into between complainants and others, including the American Society, and citizens and residents of the State of Washington, and from threatening to enforce against any citizens or residents of the State of Washington, the penalties of said Statute known as Chapter 218 of the Laws of 1937 of the State of Washington, in the event such citizens and residents desire to carry out their contracts with said Society, or complainants and others similarly situated, and from taking steps to declare an involuntary assignment of the copyrights of complainants and others similarly situated, and from filing lists thereof with the Register of Copyrights in Washington, D. C., and from taking any steps, instituting any actions or proceedings or doing anything for the purpose of enforcing said Statute known as Chapter 218 of the Laws of 1937 of the State of Washington.

And request is hereby made of the Presiding Judge of this Court to convene three Judges to hear such application for an Interlocutory Injunction as provided by Section 380, Title 28, of the United States Code, Annotated as Amended.

Dated, this 28th day of May, 1937.

Vanderveer and Bassett, Solicitors for Complainants, Alaska Bldg., Seattle, Washington. B. H. Camperson, Of Counsel.

[fol. 96] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF GENE BUCK—Filed May 28, 1937

Gene Buck, being duly sworn, deposes and says:

I am an author and have been such for over twenty years.

I am a member, director and President of the American
[fol. 97] Society of Composers, Authors and Publishers,

(hereinafter referred to as the "Society"), and am familiar with the facts set forth in the bill of complaint herein.

I have a wide and extensive familiarity with the music business as well as the theatrical business.

My own experience goes back to the days of Florenz Ziegfeld. I wrote over twenty Follies for him as well as sixteen midnight Follies produced by Ziegfeld, and some other plays. I wrote the lyrics as well as a substantial part of the book for his Follies. I wrote the lyrics for a great many musical compositions that were published in the past twenty years, some of which had a wide vogue and celebrity.

I am personally acquainted with practically all of the important members of both professions and know their problems and struggles for the past quarter of a century.

In 1930, I was elected President of the Society.

I make this motion on behalf of the complainants herein and others similarly situated, for a temporary injunction to restrain the defendants herein from enforcing the Statute passed in March, 1937, by the Legislature of the State of Washington, known as Chapter 218 of the Laws of 1937 (which is referred to in the bill of complaint herein as the "State Statute"), as and when the same becomes effective on or about June 14, 1937.

The reason that I ask for a temporary injunction is, that the enforcement of this Statute, when the same becomes effective, if not restrained by this Court, will result in such terrific hardship to myself, to the other complainants herein and to others similarly situated, that no possible redress can be had.

[fol. 98] This Statute is aimed at, and actually will succeed in destroying, the rights of complainants and others similarly situated, in their musical compositions, and will enable the users of such compositions in the State of Washington to make free use of these works, without compensation, and, not only that, but it will place such a load upon the title of the complainants' works that their rights in other states will be seriously affected, if not utterly destroyed.

In order to avoid unnecessary repetition, and in the interest of brevity, I shall not repeat the allegations already made in the bill of complaint, and I make the bill of complaint herein a part of this affidavit, and ask that it be considered by the Court with the same force and effect as if the facts therein stated were repeated by me in this affidavit.

I shall confine myself in this affidavit to amplifying the allegations of facts set forth in the bill of complaint, particularly with a view to setting forth the facts which compelled the complainants and others similarly situated to combine for the purpose of protecting their copyrights in musical compositions against infringement, by means of unauthorized public performance for profit, and to license the use for public performance for profit of the catalogues of complainants and others similarly situated; and I also desire to show by this affidavit why a per piece system is not workable and would be a hardship upon complainants and others similarly situated as well as a hardship upon honest users of copyrights who desire to respect our rights, and [fol. 99] the necessity for granting blanket licenses to users which enable them to have available at all times a reservoir of musical compositions on which they may draw instantaneously and at will without the necessity of endless negotiations with individual copyright proprietors.

The Society is an unincorporated non-profit association organized in 1914 for the purpose of protecting composers, authors and publishers of musical works against infringement of their copyrighted works, and to grant licenses for the public performance of such works for profit.

Prior to the organization of the Society, composers and authors received no compensation whatsoever from the performance of their works in night clubs, cabarets, dance halls, hotels, motion picture theatres and other places of public amusement and entertainment; the proprietors of these places, (hereinafter referred to as "users") profited from the performance of the works of these composers and authors and disregarded the United States Copyright Law, which, since 1897, granted protection to authors and composers against such unauthorized performances; such performances, especially with the advent of radio, seriously diminished the earning power of composers and authors by diminishing the number of persons attending the performance of their works at legitimate theatres, diminishing the sales of sheet music and diminishing the sales of phonograph records and music rolls, from which sources alone composers and authors received their income; the users of music combined into powerful trade associations to deprive composers and authors of any royalties from performance of their works in places of public amusement and [fol. 100] entertainment; a single composer or author is

unable to protect his rights because of the tremendous number of places where his works are performed simultaneously throughout the United States, which performances are fleeting, momentary and fugitive and cannot be detected unless a paid investigator is employed to ascertain the infringements occurring at such places; the Society has protected composers, authors and publishers of musical works against such infringement, and has supplied a means through which users of copyrighted works may readily secure a license and thus perform lawfully any of a vast number of works required for the purpose of presenting a pleasing, attractive and diversified program; but for the existence of the Society the users would refuse to pay any royalty whatsoever to composers and authors for the use of their works for the private profit of such users; the royalties charged by the Society for the use of the works of 45,000 composers and authors scattered throughout the world is nominal in comparison with the income derived by such users from the exploitation of such musical works.

The Right of Public Performance of Copyrighted Works Licensed by the Society Is Granted by the Congress Pursuant to the Constitution of the United States

Article 1, Section 8 of the Constitution gives Congress the exclusive power

"To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

The Copyright Law of 1897 granted to authors and composers the exclusive right to perform their copyrighted musical compositions publicly for profit.

[fol. 101] The Society Acts as a Clearing House to Serve the Convenience of Users, as Well as to Protect Composers, Authors and Publishers

A user cannot lawfully perform a copyrighted musical composition for profit without the consent of the copyright owner.

The successful presentation of a musical program at a dance hall, cabaret, night club, motion picture theatre, hotel, restaurant or radio broadcasting station requires from 15 to 104 musical compositions in a single hour or a single evening. Each hour or each evening requires not only dif-

ferent musical numbers but different types of music. (Musical compositions are divided roughly into popular works, production works and standard works.)

Since copyrights obtained in foreign countries are respected in the United States under reciprocal treaties with such countries, the user of music may not play the works of composers and authors residing abroad without their consent.

There are upwards of 30,000 establishments daily and hourly performing the copyrighted works of both American and foreign composers and authors.

In view of the obvious need of users of music to be able to play a given number at a moment's notice without negotiating for the consent of a particular composer or author, the users require this reservoir of music to avoid individual bargaining, and the creator of music cannot bargain for the licensing of the performance of an individual number unless he is able to offer to the user a license to perform a sufficiently large, varied and diverse program in order to enable [fol. 102] the user to present to his public a composite program suiting the taste and fancy of the particular listeners.

The works of a writer of standard music have no value for the purpose of public performance unless they can be interspersed with popular numbers and production numbers.

If a radio station limited its broadcasts to the compositions of a particular composer or to a particular class of musical compositions that composer or that class of compositions would soon find that the public would absolutely refuse to listen.

Nothing on earth can change the human desire for variety in music as well as in other fields of entertainment.

The Society performs a very useful and necessary function as a clearing house through which users of copyrighted music may secure a license to use such music without the necessity of seeking out each individual copyright owner or the owner of the right to perform publicly for profit. Such owner may be a composer, author or publisher, or some third party. It is impossible to secure in advance the consent of all the copyright owners whose works are performed in these places of public entertainment.

Prior to 1914, the copyrighted works of composers and authors were being performed for profit by users located throughout the United States, including the State of Washington, without any payment whatsoever to the writer.

The writer because of his very modest means, was unable, acting individually, to secure redress against unlawful performance of his works although such performances were in direct competition with the legitimate stage performances [fol. 103] from which, (together with royalties from sales of sheet music and mechanical reproduction), the writers derived their livelihood.

These illegal performances were multiplied in every part of the United States, including each of the Counties in the State of Washington. The illegality of such performances was extremely difficult to establish and prove, unless a trustworthy and responsible person, located in the vicinage where such illegal performances took place, was on hand to witness and hear same and to notify the infringer of his unlawful act coupled with a demand to desist from such further unlawful performances.

Prior to the organization of the Society, piracy was the accepted custom. No one paid for the non-dramatic public performance of copyrighted works for profit.

As against the meager resources of the individual writers and publishers, unorganized as they were, the users were organized into trade associations whose chief objects were to resist demands of writers and publishers of music that their performing rights be recognized and respected, and to defend by the paid counsel of each such association those of their members who might be sued for piracy.

Under the pressure of these economic conditions, a group of composers which included Victor Herbert, Irving Berlin, Silvio Hein, William Jerome, Gustav Kerker, John Golden, Glen McDonough, Ernest R. Ball, Raymond Hubbell, James Weldon Johnson, Louis A. Hirsch, Henry Blossom, myself and others, with a very few publishers, organized on the 13th day of February, 1914, the Society, principally for the protection of writers and publishers of musical works [fol. 104] against the infringement of their performing rights in their copyrighted works in all countries of the world, and for the granting of licenses for and on behalf of its members to perform for profit such works and to collect royalties for such licenses; the membership of the Society was and is limited exclusively to and is composed entirely of composers, authors and publishers of musical works; the royalties collected for and on behalf of the members by the Society from licenses to play the works of its members are distributed among its members exclusively

in accordance with a scheme of allotment of royalties provided for in its Articles of Association, a copy of which is annexed to the bill of complaint.

A part of the royalties accruing to the member of the Society collected from the users is, pursuant to the Articles of Association, devoted to the support and maintenance of the widows and orphans of deceased members and of members that have become indigent, infirm, aged and decrepit.

Since the formation of the Society, no author or composer of music has been buried in a pauper's grave or permitted to famish, or his family to famish, which conditions existed prior to the formation of the Society while the users were capitalizing and using his works for their unjust enrichment and advantage.

The Society continually extends financial aid to those who have written or are dependent upon the writers of successful musical works, in the payment of life insurance premiums, the saving of homes from foreclosure of mortgages, the payment of hospital bills, the succour of the living and the burial of the dead. None of these people ever received [fol. 105] or ever would have received a dollar from the users and commercial broadcasters who prospered commercially because of the use of the works resulting from the creative genius of these people.

Economic Conditions Necessitating the Organization of the Society

The Society was organized under the necessities of the situation arising out of the new style of entertainment offered to the public in restaurants, hotels, inns, and other public resorts. To induce the public to patronize these places and to acquaint the public with the fact that a musical program was the distinctive feature and main attraction of the establishment, these entertainments were widely advertised under the names of "cabarets", "tea dansantes", "after-theatre revues", "midnight revues", "dinner dancing", "dinner and music" and similar slogans. While no special admission fee was charged for these entertainments, it was expected that those who patronized them would purchase food and drink. In some establishments "couvert" or other charges were added to the patron's check. The patrons paid for the entertainment by a direct

or indirect charge, and the entertainment was given for direct or indirect profit.

The cabaret or revue entertainment consisted of the rendition of music and the singing of songs and dancing to the accompaniment of music. In some of the establishments, the performances were given in make-up and costume and on a platform or stage. The entertainment was advertised in the daily newspapers in the same manner, mode and means as regular legitimate attractions playing [fol. 106] at first-class theatres, which paid the authors and composers a license fee or royalty for the use of their works.

In its most developed form, the cabaret or revue is a regular show, with appropriate intermissions indicated by a suspension of action instead of lowering a curtain.

Cabaret, motion picture and vaudeville shows and revues were presented in nearly every city in the United States, the dominant, distinctive, and principal features of each such entertainment being the vocal and instrumental numbers of the current grand and comic operas, musical plays, as well as standard and popular compositions.

A leading and attractive feature of the larger hotels in the United States was the orchestra and the musical and dance program.

Dance halls which relied entirely for their operations upon music sprang up like mushrooms in every part of the United States. A direct admission fee was charged at the door of these dance halls; in some instances there was a hatcheck, in others, a specific charge of so much per dance.

Motion pictures were coming into prominence as a form of entertainment, and theatres devoted exclusively to the showing of motion pictures were erected in every city and town and village in the United States, and, of course, music and musical attractions played a very important part in such class of entertainment.

All these places of public entertainment were dependent almost entirely for their success upon the songs and instrumental numbers of the composers, authors and publishers. But no proprietor expressed a willingness to, nor did he pay a fee, royalty, or other compensation to the owner of [fol. 107] the works. On the contrary, proprietors of these resorts helped themselves to the current works without the leave or license of the copyright proprietors, completely

ignored them and their statutory rights in their property upon the ground that musical performances given by them were not for profit, because they were given without direct admission fee, or that music was merely incidental to the operation of the premises, and for that reason the performances were not subject to the control of the copyright proprietor.

The writers and publishers realized that their works were capitalized by others and were used for profit and not only that, but in some instances the performances were in direct competition with those given by legitimate theatrical managers who did pay performing royalties to the writers whose works were used. The creators of these works justly felt that they were entitled to participate and share in a modest way in the profits and revenues made possible by the exploitation of their works.

A single writer or publisher was and is helpless in dealing with these infringers for the following reasons:

As an individual, he could not protect his rights as against the tremendous commercial enterprises who would appropriate it to their use without any compensation to him.

The several groups of users of music were organized in trade associations and were prepared to use the resources of their organizations in resisting the effort of any individual composer to enforce his performing rights, while the composers and publishers were mostly men of humble and moderate income who were not able, singly, to bear the expense of ascertaining and investigating the piracies and of [fol. 108] protracted and numerous litigations.

Moreover, the use made of copyrighted music in these places was in the form of musical programs in which the works of a number of composers were combined.

The performances, as a rule, were fleeting, and unless the infringement was detected and established the moment it occurred, proof thereof was well-nigh impossible.

A single entertainment amounted to a composite infringement of a number of compositions of several composers. In the course of a year, the proprietor of a single establishment would violate the rights of hundreds of composers and copyright proprietors, and each of these was a victim of a number of piracies.

Piracies were committed in numerous establishments and in various parts of the United States, and the expense of

locating and securing the evidence of the piracies was prohibitive for the individual writer or publisher. Separate actions for each act of piracy would involve a multiplicity of litigations.

The piratical practice, having in this way a collective effect, collective and protective action by the writers and publishers was natural and necessary.

There was this further element to urge organized action. The practice grew in leaps and bounds. The resorts where musical works were performed extended to every city and to every part of every city. Motion picture theatres added musical programs to their performances, and their number grew so fast that in a few years the industry connected with motion picture shows became one of the largest industries in the United States. At the present time there are over [fol. 109] 16,000 such theatres, attended by more than 80,000,000 patrons each week.

In many motion picture theatres vaudeville has been displaced by a form of musical and dramatico-musical presentation. The stage performance often takes an entire hour and such stage performance is advertised in many instances as the main attraction at such motion picture theatres. Indeed, many patrons of motion picture theatres attend merely for the musical presentation.

The box office receipts of some of these theatres have averaged over $100,000 for a single week.

In addition, many regular theatres have been converted into so-called cabarets or night clubs, giving regular ambitious stage performances in the same manner as legitimate theatres.

In view of the multitude of places where his rights were being infringed (including places located in each of the Counties in the State of Washington), it was impossible for an individual composer to ascertain and prosecute even a small number of the piracies.

Without the collective action of at least a certain number of writers and copyright proprietors, the performing rights secured by the copyright law remained without effective protection. It became evident that unless composers and copyright proprietors organized in sufficient number to provide mutual aid and the necessary funds for the protection of their rights against an army of pirates, most of whom were banded together in trade associations for the express

[fol. 110] purpose of making piracy a safe practice, all the rights granted by the law to copyright proprietors would be nullified.

Furthermore, an organization of the composers, authors and copyright proprietors was necessary to meet the demands of users who in compliance with law desired to obtain licenses to use copyrighted songs and music and were willing to pay compensation for the use of such works.

No place of public amusement could carry on its musical entertainment by confining its program exclusively to the works of a single composer. Programs had to be attractive, pleasing, international and diversified, and to present the current songs and instrumental numbers that were in vogue or were the reigning "hits" of the day—those that had received popular acclaim, or appealed to the whims, taste and fancy of their patrons.

A dance hall required an average of 81 tunes for its nightly program and the other places of public entertainment from 15 to 104 separate and distinct numbers of different composers. In other words, the program, to be entertaining, had to be composite.

The organization was necessary because of the hardship and inconvenience imposed upon users and commercial broadcasters in securing the consent of individual writers and proprietors whose works they wished to include in their programs. Writers and publishers were scattered throughout the United States and in foreign countries. Required to deal with them as individuals, there was no possibility of finding them and procuring licenses without difficulties which in the great majority of cases were insuperable. Under these circumstances, copyright infringement and its [fol. 111] consequences were unavoidable. It was obviously to the advantage of the users located in various parts of the United States, including users located in the State of Washington, to deal with an association of writers and copyright owners who, unless thus organized, could not be found.

The value, both to the author, composer and publisher, as well as to the users and commercial broadcasters, of such an organization was proven by the experience abroad. Similar societies had been organized and were functioning in France, England, Italy, Austria and Germany.

In France, in January 1851, there was organized a society known as "Societe des Anteurs, Compositeurs et Editeurs de Musiques", the purpose of which was to protect composers, authors, and publishers of musical works against piracies of any kind, and to grant licenses and collect royalties for the public performance of the works of its members. That society conducted its operations and activities to the mutual advantage of all parties interested, and said French society served as the model for the Society.

Under the scheme of organization of the Society, the publisher did not and does not now enjoy any right in the work superior to that of the composer or author thereof, insofar as the Society is concerned. The writer and the publisher shared and how share equally in the royalties or license fees derived from the exploitation of the performing rights.

At the outset the users of copyrighted music refused to recognize the rights of public performance, and the national, state and city associations representing the users of copyrighted music informed the Society that they would resist [fol. 112] to the utmost any attempt to prevent their members from using copyrighted songs belonging to members of the Society, and that they would under no circumstances permit any of their members to take out licenses from the Society or to treat with it in any way.

Hotels

The owners of hotels consistently refused to pay for the use of music until the United States Supreme Court decided that the performance of copyrighted music in hotels was a performance for profit, since the music was used as an inducement to bring patrons into the hotel (Herber' v. Shanley, (1917) 242 U. S. 591).

In that case, Victor Herbert and his collaborators were the composers and owners of a comic opera called "Sweethearts", then given by Klaw & Erlanger, theatrical managers, at the New Amsterdam Theatre, in New York City, under Herbert's license. The Shanley Co. operated a cabaret wherein they caused to be sung the leading song features of such opera accompanied by an orchestra. There was no charge at the door, but patrons were obliged to pay a so-called cover charge, which was fixed at $2 per head. As a matter of fact, this cabaret was competing with the licensed legitimate stage production.

Justice Holmes, declaring such performance an infringement of the copyright, said, at page 594:

"If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly [fol. 113] that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order, is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. * * * If music did not pay it would be given up. If it pays it pays out of the public's pocket. Whether it pays or not the purpose of employing it is profit and that is enough."

Many of these hotels are in competition with legitimate productions. Their advertisements disclose the fact that they do not stress the quality or merit of food or services or the desirability of their hostelry, but rather call to the attention of the public their floor shows, orchestras and other forms of musical entertainment, the interest of the public is sought to be stimulated and attracted by these facilities.

Motion Picture Exhibitors

After the decision in Herbert v. Shanley, in 1917, while the hotelmen made some effort to work out an agreement with the Society, the motion picture theatre owners, through their trade associations, refused to concede that the decision was applicable to the playing of copyrighted music in motion picture theatres. They declared that no direct admission fee was charged for hearing the music and that the music was incidental to the entertainment.

It was therefore necessary to test out the issue as to the applicability of the copyright law to that newer type of public amusement. The Motion Picture Theatre Owners [fol. 114] of America challenged the rights of the society and a test suit was brought by Raymond Hubbell (a member

of the Society) against the Royal Pastime Amusement Co. (a motion picture exhibitor) for the playing of Mr. Hubbell's song, "Poor Butterfly", which was a feature and "hit" of the then current New York Hippodrome production, from which Mr. Hubbell had been deriving a performing royalty.

The action was defended by the local trade association. The case was decided in favor of the plaintiff, in a decision rendered May 31, 1917 (242 Fed. 1002), the court holding that the copyright law applied to motion picture theatres.

Although the motion picture exhibitors presented elaborate stage performances, which often took as much as an hour and more, and were advertised as the main attraction, they refused to pay anything to the authors.

The Motion Picture Exhibitors League of America went so far as to adopt, in April 1917, a resolution which read:

"That the organization undertake legal defense of any exhibitor against whom action is brought by the American Society of Composers, Authors, and Publishers, to apply to nonmembers as well as members."

The Motion Picture Exhibitors League of America's activities did not deal with the matter of procuring funds to combat the Society only, but brought an action at its own cost and expense and with counsel supplied by it, in the name of one of its members, the 174th Street & St. Nicholas Amusement Company v. George Maxwell, as president of the Society and its Directors (169 N. Y. Supp. 895) to restrain the Society from conducting its operations, from act- [fol. 115] ing in concert to demand fees as a condition precedent to the playing of musical compositions, from using the funds of the defendant Society in furtherance of its objects, and enjoining its directors and officers from meeting with any purpose to act in combination or concert, upon the ground that the defendants were a monopoly in restraint of trade. In this action it failed, the court saying:

"* * * The fact that the music of the authors who are members of the association is popular and in demand presents just so much more reason why it should be protected, and its unauthorized use at public entertainment given for profit prevented. Practically the exhibitors of moving pictures seek to obtain by injunction the right to publicly perform copyrighted musical compositions for profit, without

a consent of the holder of copyright, and without compensation to him."

Radio Broadcasters

With the development of broadcasting in 1922, there was a new invasion of the rights of the authors. Radio took the most popular musical hits of the day, and by constant grinding and repetition of songs acted as a veritable inferno greatly shortening the life of a song and ruining the sale of sheet music and phonograph records, from which the authors had previously derived the major part of their royalties. In spite of this great injury to the author's works the radio broadcasting stations refused to make any payment to authors. The National Association of Broadcasters issued the following proclamation:

"To publishers of dance, jazz, blue, and popular music: The members of this association maintain that they will not pay for licenses from any copyright owner or recognize the right to collect any tax until the law plainly states that such payment must be legally collected."

[fol. 116] The challenge of the broadcasters was accepted by the Society and a suit was brought in behalf of a member, M. Witmark & Sons, against Bamberger & Co., in the United States District Court of New Jersey, to restrain a department store dealing in radio products from broadcasting the plaintiff's copyrighted music. Judge Lynch in that case held that radio broadcasting was a public performance for profit (291 Fed. 776).

Notwithstanding the decision in the Witmark case, the broadcasters refused to respect the rights of authors. Thereupon, Jerome H. Remick & Co. brought a suit in the District Court of Ohio against the American Automobile Accessories Co. (owned by the Crosley Manufacturing Co., which was engaged in selling radio accessories and equipment) for infringement of the musical composition by radio broadcasting. Although the district court dismissed the suit, the rights of the copyright owners were upheld by the Circuit Court of Appeals in an opinion by Judge Mack in 1925 (5 Fed. [2d] 411). Certiorari was denied by the Supreme Court.

Broadcasters and hotel owners continued to challenge the rights of copyright owners to be paid for the broadcasting of their works as late as 1931, when the United States Su-

preme Court held that a hotel which picked up a program of copyrighted music emanating from an unlicensed broadcasting station must pay the copyright owner (Buck v. Jewell-LaSalle (283 U. S. 191).

The Statute Complained of is Part of a Deliberate Program on the Part of Users to Place Composers at the Mercy of Users

[fol. 117] William S. Hedges, chairman of the executive committee of the National Association of Broadcasters, in the hearings before the Congress on H. R. 12549 (Jan. 28, 1931), at page 44, declared:

"It is unnecessary to direct attention to the fact that music is, in the main, the raw material from which broadcast programs are constructed and is, therefore, almost the lifeblood of the broadcasting business."

The National Association of Broadcasters has laid out a program with which to combat the association organized for the protection of song writers. In respect of this the NAB Bulletin, February 18, 1936, entitled "Report on Copyright", states (p. 19):

"3. The only occasions in the past on which ASCAP has seemed really willing to negotiate have been when by reason of developments on other fronts the broadcasting industry seemed on its way toward achieving a measure of progress toward bargaining equality.

"A corollary conclusion is that, to have any hope of success, the broadcasting industry must concentrate on removing so far as possible the obstacles which have been enumerated under the previous subheading. Such a program includes litigation, legislation, the establishment of an independent source of music supply, doing away with the discriminatory ASCAP contracts, eliminating the objectionable features from network-affiliate contracts, and any and all steps and proceedings necessary to these ends."

The implication of this extraordinary statement is that by means other than ordinary negotiation it has forced the Society to accept terms and fees of licenses dictated by the NAB and its members. Those methods were threats of numerous and costly lawsuits, hostile legislation and various campaigns to harass, vex, and annoy the Society, and

[fol. 118] to put it to large expense to aggressively resist the attempts to destroy it.

This policy was not new, novel, or original with NAB. The motion picture theatre owners have pursued a similar policy.

Separate suits in State courts were instituted by members of each association for the purpose of preventing the Society from carrying on its activities in each such respective State. These suits were sponsored by the respective associations. Complaints were filed with the Federal Trade Commission and with the Department of Justice of the United States.

The Society, having been thoroughly investigated by these two agencies of the Federal Government, was given a clean bill of health.

The Federal Trade Commission in dismissing the charges on January 2, 1923, said:

"The chief reason for this conclusion may be stated as the fact that the making of a claim for royalties, apparently in good faith, cannot be said to constitute 'an unfair method of competition in commerce'."

The Department of Justice in dismissing the charges on August 6, 1926, said:

"A thorough and comprehensive investigation was made of the organization and operations of that society. Several special agents of the Bureau of Investigation were engaged in that investigation and it was conducted almost continuously for a period of about 2 years. The Society has been advised that the Department saw no reason for proceeding against it under the antitrust laws on account of its operations in collecting licenses for the public performances of copyrighted music from the owners of motion picture houses, of hotels, of dance halls and of similar places where copyrighted music is publicly performed for profit.

[fol. 119] "It was found that the rights conferred under the Copyright Act by Congress on the owners of copyrighted music had repeatedly been held by the Federal courts to be violated by the unlicensed performance of such music, in amusement where the performance of the music constituted at least part of the public entertainment from which the owner of the place of amusement derived profit through the charges made to his patrons."

In respect of the New York State court suit, that court, in dismissing the action, held (169 N. Y. Supp. 895):

"The fact that the music of the authors who are members of the association is popular and in demand presents just so much more reason why it should be protected, and its unauthorized use at public entertainment given for profit prevented. Practically the exhibitors of moving pictures seek to obtain by injunction the right to publicly perform copyrighted musical compositions for profit, without a consent of the holder of copyright, and without compensation to him."

The broadcaster, having secured a license upon terms entirely satisfactory to him, saw no reason for prosecuting such suit any further.

A flood of bills was introduced into the Congress for the purpose of exempting broadcasters, exhibitors, and hotel owners from any liability in respect of the public performances of musical works for profit. Extensive and exhaustive hearings were held thereon and all failed of passage.

The Society, having submitted to the exactions of these users and acceded to their demands, activities, both in respect of litigation and legislation, thereupon ceased until shortly prior to the expiration of licenses between users and the Society.

Beginning with 1934, threats were made by the responsible [fol. 120] officials of the NAB (representing practically all of the radio broadcasting stations in the United States, including the broadcasting stations in the State of Washington enumerated in the complaint herein), that unless the Society renewed its existing licenses upon the same terms and conditions, the Society would be subjected to a barrage of hostile legislation and institution of suits and the filing of complaints with the Department of Justice.

About the same time, a three-point program of activity was begun by the NAB which included litigation against the Society and the securing of copyright modification of the composers' and authors' rights. The membership was asked to contribute 10 percent of the payments made to the Society as a war chest, with the slogan "10 percent now or 300 percent in 1935."

To carry out the program:

"Large contributions were sought from and made by independent stations as well as by the networks and Levy,

for the carrying forward of the program of which this was an integral part" (p. 6 NAB Special Report, Feb. 18, 1936).

The Society, having refused to submit to these species of extortion, the following steps were taken:

The broadcasters, through one of their members, instituted a suit for the dissolution of the Society (Pennsylvania Broadcasting Co. v. Buck), now pending in the United States District Court for the Southern District of New York.

A suit was commenced by the United States Government, in the United States District Court for the Southern District of New York, pending at the present time.

[fol. 121] A suit was instituted in 1935 by the State of Washington, in the Superior Court, Thurston County, for a dissolution of the Society, in which a receiver was appointed. The result of such suit was that during the pendency of that litigation, the Society received absolutely no revenue from the use of the works of its members throughout that entire State. The suit was subsequently dismissed on the merits, on July 6, 1936, by decree, which is annexed to the complaint herein as Exhibit "I".

Prior to the dismissal of the Washington State suit copies of the papers in that suit were reprinted by the NAB and sent to each member. In respect of this activity, the Cincinnati Bill Board (Feb. 15, 1936) observes:

"It is believed that this move on the part of James W. Baldwin, managing director of the NAB, is an effort to help along similar moves in States that have laws like those of Washington, or those that desire to seek such legislation.

"Portland, Oreg., February 8.—Group of broadcasters here were told by a Washington authority that certain laws of the State are similar to those of Washington and suitable for a monopoly suit against A. S. C. A. P."

The pendency of the Government suit has been used as a justification and defense for piracy by many users performing the compositions of the Society's members.

Certain members of the NAB holding licenses from the Society have furnished inaccurate and misleading returns, resulting in very substantial losses to the members of the

Society. The shortage ranges from $2,400 to $40,000 in respect of certain stations.

Foreign-government-controlled and noncommercial radio stations pay composers more for music than do American [fol. 122] commercially operated stations.

In the report of Judge Parker, a Commissioner appointed by the Canadian Inquiries Act, dated the 29th day of October, 1935, he says (p. 35):

"Taking the number of radio receiving sets in the United States and the gross revenue derived by the American Society of Composers, Authors, and Publishers from the American broadcasting stations, the rate per receiving set works out at about 9½ cents.

* * * * * * * * *

"The Canadian Performing Right Society, Ltd., in arriving at the basic fee of 10 cents per receiving set in Canada had regard to the rates charged in other countries, giving the following examples:

	Cents per set
"Denmark	13
Great Britain	7 ¾
Australia	30
United States	9 ½
Germany	9
Austria	10 ½
Norway	16
Czechoslovakia	10
France	5
Finland	5
Italy	13"

It must be borne in mind, however, that in none of these countries are the stations operated commercially; that is, time on the air is not sold to advertisers. The sole revenue derived by the governments is from the licensee fees collected from receiving sets, out of which a proportion thereof is paid to the Performing Right Society operating in that particular country.

It must further be borne in mind that in none of these countries do the radio stations serve such coverage areas, embracing as many families owning as many radio sets and the potential listening audiences as American stations en-

[fol. 123] joy. This is illustrated by an advertisement appearing in Variety, February 19, 1936:

"As the Most Powerful Station in Philadelphia and as the Oldest

"WCAU was the first Philadelphia station established exclusively for radio advertising. As the only Philadelphia unit of the Columbia Broadcasting System WCAU serves a primary coverage area in which there are 1,429,124 families, of which 1,312,011, or 91.7 percent, own radio sets. A potential listening audience of 4,592,038. WCAU, 50,000 watts, Philadelphia, Pa.

Robert A. Street, Commercial Manager."

This station for the year 1934 paid the Society $15,981.

Users Have Always Struggled to Secure Performing Rights Free and This State Statute is Part of the Program in This Direction.

The National Association of Broadcasters chooses to appear in the light of an apparent champion of the composer, and in its bulletin (Feb. 18, 1936, p. 2) says the following:

"In pursuing this or any other programs, it cannot be made too clear that it is in the best interest not only of the broadcasting industry but of the public that every encouragement be given to writers and composers of music; both for the sake of the advancement of their art as such and in order that a constant supply of music of the best quality be made available to listeners. To accomplish this, as I know is realized by the entire industry, no scheme will succeed that attempts to do anything else than compensate them, and compensate them generously, for their work and their talent."

[fol. 124] Put to the acid test a few illustrations will suffice to show that the professed generosity has been wholly in favor of the broadcaster

Every step taken up to the time of the issuance of this bulletin was to secure from songwriters the free use of their compositions for public performance for profit, either by voluntary licenses or by compulsion under acts of Congress or by judicial determination.

The National Association of Broadcasters, in a circular letter dated December 31, 1923, and signed by Raymond

Walker, manager of the Bureau of Music Release, solicited compositions for broadcasting purposes free of charge over the stations of the association upon the condition that—

"When a number has been accepted by us for release, the copyright owner furnishes us with 100 dance orchestrations and the same amount of professional or song copies which we distribute to our members who in turn place them in the hands of artists who broadcast at their stations. The copyright owner also signs contracts allowing us a fair percentage of the mechanical royalties."

This practice with respect to nonmembers of any performing rights organization still prevails.

Station WLS of Chicago, Ill., a commercially operated station having 50,000 watts, affiliated with the NBC Blue network, as late as March 1935 solicited licenses from composers who were requested to sign a regular blank form of release prepared by the station as follows:

"We hereby grant you a license to perform for radio broadcasting and to radio broadcast (including television) such performances over any stations you may desire, by wire lines or by means of any mechanical device, any or all [fol. 125] compositions published by us and/or bearing our name as copyright proprietor and/or any or all compositions for which we now control the performing rights or for which we may acquire performing rights during the period of this agreement.

"Neither you nor any of the radio stations broadcasting such compositions pursuant hereto shall be required to pay license fees for such performances and broadcasts. You shall have unlimited discretion as to the time, place, and frequency of performance and broadcast."

June 28, 1935, station WNEW, Newark, N. J., 2,500 watt station, commercially operated in New York City, advertising itself as the largest regional station in the metropolitan trading area, solicited permission under blank form of license, which reads:

"It is hereby agreed that I grant you a license to perform for radio broadcasting over station WNEW and to radio broadcast or perform over the above-mentioned and other stations owned or controlled by or affiliated with you, all music of my composition (except such as hereinafter de-

scribed), granting you the rights under the period of this agreement.

"Neither you nor any associated stations broadcasting such music shall be required to pay a license fee for such performance or broadcast.

"This agreement shall include all music of my composition except such as may be reserved by me by means of formal written notice delivered in your hands."

On September 4, 1935, WOR, Bamberger Broadcasting Service, Inc., Newark, N. J., a commercially operated station affiliated with Mutual Broadcasting System and stations WGN Chicago, WLW Cincinnati, and CKLW Windsor-Detroit, solicited permission to broadcast numbers on its blank form releases, which read as follows:

"We hereby grant you a license to perform for radio broadcasting and to radio broadcast (including television) [fol. 126] such performances over any stations you may desire, by wire lines or by means of any mechanical device, any or all compositions published by us and/or bearing our name as copyright proprietor and/or any or all compositions for which we now control the performing rights or for which we may acquire performing rights during the period of this agreement.

"Neither you nor any of the radio stations broadcasting such compositions pursuant hereto shall be required to pay license fees for such performances and broadcasts. You shall have unlimited discretion as to the time, place, and frequency of performance and broadcast.

"The duration of this license to perform shall be for a period of 1 year from the date hereof, and thereafter it shall continue in effect until 30 days after the giving of written notice to you by mail directed to you at your Newark address.

"You are also authorized to make such arrangements and transcriptions of said works as you may find necessary or desirable for broadcast use, and to have and permanently retain as your property all materials thereof which you have deemed it expedient to make or duplicate for the purpose of facilitating such performance."

October 14, 1935, the National Broadcasting Co. requested Mrs. Justin Elie, the widow of a composer, to grant it a

license to perform her husband's work upon these conditions:

"I do further license you to perform and to license others to perform said compositions and to radio broadcast (including television) said performance over any stations you may desire wherever located without the payment of any performing right or broadcasting fees whatever."

Upon the trial of the United States v. The Society, (S. D. N. Y., 1935, case unfinished), one Thomas Belviso (a Government witness), the program director of the National Broadcasting Co., testified as follows (p. 376-378):

[fol. 127] "And doesn't that mean licenses from individual publishers or composers?

"A. Yes, we have some of those, too.

"Q. And you do from time to time take licenses from persons, firms, and corporations who are not members of the society?

"A. True.

"Q. And as to those, you call them by the name of private licenses?

"A. That is right.

"Q. Now, does the National Broadcasting Co. pay for those private licenses?

"A. No, we do not.

"Q. These you get for nothing?

"A. That is right."

He further testified that in respect of certain Argentine numbers which he required for his program, he just took them and did not pay for the right to broadcast them (p. 378):

William Benning (A Government witness), program director of WTMJ, of Milwaukee, Wis., 5,000-watt station, commercially operated, testified that he required nonmembers of any performing rights society to sign substantially similar releases as those hereinabove described; that there were quite a few of such releases and under them the composers received not a penny for the broadcasting of their works (pp. 681, 682, 683).

The society stands between the exploiter and the victim. If the society can be destroyed by litigation or legislation

the organized users will easily secure licenses upon starvation terms.

In Performing Rights Society of Great Britain in its case against Thompson (34 T. L. R. 351) the Court says:

[fol. 128] "Now, the position of the plaintiff company appears to be this: It was formed in the year 1914 and the circumstances under which it was formed apparently were these: It was found that it was difficult for authors to recover the proper remuneration for their performing right in respect of infringements that might take place all over the country. Such author would have to, first of all, ascertain whether his work was performed or not, and then would have to enter into the necessary correspondence with regard to it, and if the correspondence was insufficient to protect him, to undertake the necessary litigation, and, on the other hand, if persons desired to be honest and pay for the property that they were using, it was not very easy for them to ascertain in all cases where the copyright was or who they had to ask for permission to perform.

"These difficulties, as I understand, are difficulties that have existed for a number of years not only in this country but in other countries, and in other countries societies have been formed in which music composers and music publishers have associated together in an association which protects for the authors and composers who form the members of the association their respective rights of copyright, and, following upon the lines of the large and successful French society with similar objects, in 1914, this society was formed and it now comprises amongst its members a number of the leading publishers of popular music and leading composers of popular music * * * There is no doubt it comprises a large number of persons who in every respect represent the musical world so far as it can be judged by the composition and publishing of popular music. * * * One has very little sympathy when a thief complains of the organization of the police force and one would not listen with sympathy to a complaint by a burglar that the constable who arrested him was receiving larger remuneration than he ought to have or that he was going to receive a bonus for his success in detecting the crime. I am not suggesting, of course, in this case, that the defendant was in the position of a thief or burglar, but at the same time one has to remember

that there are a great many persons honorable in every transaction of life who do have very loose notions as to the honesty of dealing with other persons' property in such [fol. 129] matters as copyright * * * I certainly think that it is satisfactory to find that this society, which, after all, in the present case is merely engaged in securing the fruits of their labors to the musical composers, has a legal object and cannot be defeated in what one cannot help feeling is a position of public interest."

The Select Committee of the House of Commons, Great Britain, which investigated the performance of copyrighted musical works in 1930 reported:

"Nor do they wish to place any obstacles in the way of composers forming an association for the purposes of protecting and enforcing their performing rights. Such an association is undoubtedly a convenience and almost a necessity, both to the composers, music publishers, and the user of music who would be considerably embarrassed if he had to deal separately with each piece of music performed. In fact it may be said to be the only practicable way in which the composer can collect his fees for performing rights in any adequate manner. If such an association is to function effectively, it must obtain as nearly a super-monopoly of the monopolies conferred upon composers by the copyright acts."

In the report of Judge Parker, a commissioner appointed by the Canadian Inquiries Act, March 22, 1935, he makes the following statement (p. 7):

"* * * Then came the radio and the sound film, and the employment of many thousands of people in the production of music for broadcasting and the showing of films.

"With such developments it became impossible for any individual author or composer to be able to ascertain the extent to which the composition which was the subject of his copyright was being produced in one or other of the many forms of musical production which had come into existence. This made it necessary for authors and composers to have some kind of organization to protect their interest. Such an organization had been existent in France

for many years, but the need for such organizations was emphasized by the new conditions which had arisen.

* * * * * * *

[fol. 130] "It is a central bureau established for the convenience of the copyright owners on the one hand, and the music users on the other hand, and it was conceded by all those appearing at the inquiry that such a bureau is necessary to protect the performing rights of authors, composers, and publishers, and is a convenience to the users of music in obtaining the performing rights."

Composers Now Look to the Royalties Derived from Licenses to Broadcasters, Exhibitors and Hotels as Their Principal Source of Income from Their Works.

Judge Parker of the Canadian Commission found (p. 9):

"Copyright in a musical work is divided into three separate property rights. They are, first, the right of publication in printed form; second, the right of reproduction on mechanical contrivances; and third, the right of performance. The Copyright Act of Canada sets out specifically what it meant by performing right. In a nontechnical sense, and with particular reference to music it may be described as the exclusive right to perform a musical work in public.

"Until recent years, authors, composers, and publishers looked mainly to the first property right mentioned above in the form of sales of sheet music for their revenue. With the popularization of records, the second property right came into prominence, and although this provided a new source of revenue to the owner of the copyright, there was a decrease in the sales of sheet music, with a consequent loss of revenue from that source. It is to be observed that these first two rights which were looked to for revenue are not performing rights.

"In the last few years the development of radio has caused a decrease in the sale of sheet music and records. The broadcasting stations have undoubtedly familiarized the public with many pieces of music, but the total result has been a reduction in revenue for the authors, composers, and publishers from the sale of sheet music and records. [fol. 131] The societies which control the copyright, includ-

ing the performing right, have looked to the fees from licenses conferring the performing right upon music users to compensate them in part for the losses suffered from the decrease of sales of sheet music and records. This consideration has been one of the factors determining the tariff of fees for performing rights."

The piano, the phonograph, victrola, and player piano have been relegated to the "horse and buggy" era. The sales of sheet music, phonograph records, and piano rolls have been reduced by 80 per cent by radio competition.

The Widespread Use of Radio Has Seriously Diminished the Income of Authors and Composers from Other Sources

Simultaneously with the growth of radio and its use of music came a diminution of income to the authors and composers.

The income from sales of sheet music and books of music graphically illustrates the decline in income since the advent of radio. The United States Government reported the following income from those sources:

1927	$17,146,715
1929	16,537,747
1931	12,203,657
1933	2,340,723

The income from mechanical royalties for six representative publishers in the field of popular music graphically illustrates the decline in income since the advent of radio. The publishers reported the following income from that source:

[fol. 132]

1924	$638,380.56
1925	714,724.80
1926	936,224.72
1927	852,588.82
1928	723,689.72
1929	562,267.20
1930	284,139.81
1931	173,668.57
1932	79,337.53
1933	51,770.88

A similar loss of mechanical royalties was suffered in the field of standard music where the income of six representative publishers from 1924-34 inclusive was as follows:

1924	$27,701.01
1925	19,012.77
1926	13,767.90
1927	11,771.85
1928	15,300.12
1929	13,560.84
1930	7,724.12
1931	5,390.67
1932	4,744.90
1933	3,345.88

Statistics reveal the decline of the legitimate show. The Motion Picture Herald compiles statistics which show that whereas in 1920 there were 68 musical productions, in 1934 there were only 24. In 1920 there were 26 successful musical "hit shows" and in 1934 about 8. A compilation of the total number of musical productions and musical hits from the Motion Picture Herald of November 17, 1934, is as follows:

Year	Total musical productions	Musical-hit shows
1920-21	68	26
1921-22	54	20
1922-23	54	15
1923-24	50	24
1924-25	59	30
1925-26	62	27
1926-27	70	29
1927-28	69	27
1928-29	63	25
1929-30	62	21
1930-31	45	13
1931-32	46	9
1932-33	32	9
1933-34	24	8

[fol. 133] The public looks to the radio for its amusement, recreation, and entertainment. The public pays for that

entertainment by way of added charge to the merchandise purchased by it and advertised through radio media.

What Was Spent for Radio in 1936

(Compiled by Radio Today, January, 1937)

Sale of time by broadcasters	$114,000,000
Talent costs	36,000,000
Electricity, batteries, etc., to operate 33,000,000 receivers	150,000,000
8,000,000 radio sets sold	440,000,000
46,000,000 replacement tubes	31,000,000
Radio parts, supplies, etc.	45,000,000
Servicing radio sets	75,000,000
U. S. Public paid for radios in 1936	$891,000,000

This $891,000,000 could never have been realized but for the raw material furnished to the radio industry by the world's composers. Eighty percent of broadcast periods are devoted to music. The broadcasting industry paid $3,200,000 for the year 1936 to the American Society and its affiliates representing 44,000 composers.

On January 1, 1937, there were 33,000,000 radio sets in use in the United States. The radio audience is 80,000,000.

The radio broadcasters in the State of Washington, as well as in other States of the Union, are making a profit of 350% on their investment. This is borne out by a statement made by George H. Payne, one of the Federal Communications Commissioners, as reported in "The New York Times" of April 25, 1937 and reprinted in "Broadcasting" of May 1, 1937, the spokesman for the radio broadcasters of the country. The article is as follows:

[fol. 134] "Payne Reported Seeing '350%' Profit for Radio

"In Another speech on the subject of broadcasting, FCC Telegraph Commissioner George H. Payne is reported in the *New York Times* of April 25 as stating that the industry will probably show a profit of '350 per cent' this year. He addressed the conference of District 2 of the American College Publicity Association at Adelphi College, Garden City, L. I. Mr. Payne again was quoted as asserting that there was $40,000,000 invested in the broadcasting business and that its gross revenue last year was $107,000,000.

"Although expressing the belief that there was a great opportunity for college men and women in broadcasting, Mr. Payne is quoted in the *Times* as saying:

"'Unless broadcasting companies begin to pay attention to public criticism, they face a rough road ahead. In every other country of the world they do not permit advertising and they send cultural education over the air. In this country we allow the broadest liberty. Some broadcasts are pumping into private homes material about nostrums, foods that have not been demonstrated as beneficial and certain medicines that the people should never be urged to buy.'"

Salaries Paid to Radio Artists

The radio broadcasters have always objected to paying anything to the 44,000 song writers throughout the world whose music makes the operation of their stations commercially profitable. But there seems to be no limit to the salaries paid to those who merely perform these songs. The following 15 radio artists received more per week from radio than all the song writers combined (Heinl Radio Letter, Jan. 4, 1935):

[fol. 135]

	Preradio	Postradio
Joe Penner	$850	$7,500
Ben Bernie, orchestra	2,000	7,500
Fred Waring, orchestra	3,500	10,000
Eddie Cantor	7,500	12,000
Jack Benny	2,000	4,500
Phil Baker	2,000	5,000
Burns and Allen	850	5,000
Kate Smith	850	6,500
Morton Downey	1,500	4,500
Block and Sully	750	2,500
Jane Froman	400	2,000
James Melton	300	1,500
Jack Pearl	2,000	8,500
Ed Wynn	5,000	10,000
Dave Rubinoff	400	2,500

In 1936, $36,000,000 was spent for talent by sponsors presenting commercial programs over broadcasting stations in the United States. Artists' bureaus of radio stations, including those located in the State of Washington, receive substantial fees for booking these features. An idea as to

how the income from this source has been increasing is that in 1927 $1,000,000 was spent for radio talent. In 1928 and 1929 $5,000,000 was spent. In the short space of 8 years the expenditures in this direction have increased 36 times.

Advertising agencies for presenting radio programs on behalf of commercial sponsors for 1934 received $9,000,000 as commissions. The Agency's participation is merely booking the sponsor on the radio stations and then directing or participating in the staging of the show for the sponsor. In every instance the raw material for each program which the agency helps to bring together is the music. For this the 45,000 authors and composers of the Society whose music was used, received $2,058,392.93.

Says Justice Owen in the report of the Australian Royal Commission (1933):

[fol. 136] "That broadcasting generally has affected the sales of sheet music and records is undoubted. It supplies attractive entertainment and variety easily and cheaply within and without the home, with the result that the public look to broadcasting for pleasure and recreation rather than to sheet music and records."

The talking motion picture, the radio musical entertainment broadcast, the hotel and night club floor shows have been the legitimate theatres' most aggressive competitor. So much so that legitimate musical attractions presented in each year on the New York stage have been reduced by 70 per cent, owing to this keen competition.

Says the Motion Picture Herald (Nov. 17, 1934):

"The so-called 'legitimate' production long ce gave up the ghost as a serious competitor to the motion picture, and, regardless of its progress henceforth, it is generally considered unlikely that the stage ever will be resurrected in a form that will cause the motion-picture exhibitor any concern."

Subsequent events will bear out this prophecy.

Constant Radio Repetition Shortens the Life of a Song

The constant broadcasting of a particular composition shortens its popularity and prevents the composer from securing such returns from other sources as were formerly possible. An outstanding hit is often played from 10 to 12

times a night. The life of a song is shortened by too frequent repetition. Two months is fairly close to the limit for the life of a song in the popular class today.

Radio broadcasters themselves realize the destructive effect of too constant repetition. Mr. Roy F. Durstine, representing one of the largest advertising agencies in the United States, writing in Broadcasting, January 15, 1935, listed as a suggestion to commercial broadcasters:

[fol. 137] "Keep popular songs from committing suicide by restricting them from being played every night in the week on every station, if not on every program."

For the year 1934 over 85 songs were played over the air 10,000 times, or more, each, over stations affiliated with the National Broadcasting Co. and the Columbia Broadcasting System.

Sound motion pictures caused a reduction in the employment of musicians. According to the American Federation of Musicians, there were employed 16,000 less musicians in motion picture theatre orchestras in 1932 than in 1925.

In practically every home the radio has become the common form of entertainment. The piano and the player piano, as well as the victrola, are no longer the principal instrumentalities by which the people in the homes are entertained. The record of the sale of pianos discloses as follows:

In 1923 the sale of pianos amounted to $104,000,000; in 1925, $93,670,000, and subsequently fell off, until in 1931 it was $12,000,000; and the latest figures available, to wit, 1933, disclose that the sales amounted to $7,000,000.

The sales of phonographs in 1925 amounted to $22,600,000, and reached a peak in 1927 of $46,000,000. In 1931, it was $4,869,000. Today no figures are available, because of the combination of phonograph and radio in one set.

In some radio stations electrical transcriptions are used as a means of providing entertainment either in the form of "spot" broadcasting, sponsored programs, or sustaining programs.

[fol. 138] The owners of broadcasting stations derive income, benefits, and advantages from several sources, directly and indirectly. The direct sources of income are (a) moneys paid to the stations by advertisers for time on the air; (b) moneys received by stations from the operation of artists bureaus; (c) miscellaneous.

Sales of Time on the Air

In 1933 the income of all radio broadcasting stations for the sale of time on the air was $45,000,000; in 1934 it was $73,807,000, in 1935, $88,000,000; in 1936 it was $114,000,000.

The twenty stations located in the State of Washington received a net revenue from the sale of time on the air to advertisers, alone, in 1935, the sum of $1,104,000.

During that year, they paid to the Society, under license agreements for the right to perform publicly for profit the copyrighted musical compositions of the Society and its members and the 14,000 members of the affiliated societies, the sum of $38,292.42.

83.7%, or a total of 371,600 families in the State of Washington, out of the entire number of families in that State, totalling 444,100, own radio receiving sets. These figures appear in the May 1, 1937 issue of the magazine "Broadcasting", and were compiled by the joint committee on radio research of a number of radio broadcasting associations, including the NAB.

[fol. 139]

Artists Bureau

In addition to the receipts from sponsored programs many broadcasting stations operate artists bureaus from which they derive substantial income.

These artists bureaus arrange for and provide talent for radio programs. In many instances the artists used in commercial programs are individuals who have been presented on sustaining programs.

The artists bureau makes a commission ranging from 10 to 25 per cent for all engagements filled by its artists, which commission is paid by the artists. It likewise makes agreements with these artists under which their services are made available not only for radio programs but also for concerts, private parties, motion pictures, the legitimate stage, social functions, tours of vaudeville theatres and other types of amusement places, and in its agreements provide for commissions on each contract made on behalf of said artists. The Columbia Broadcasting System concert bureau handles 124 artists, and National Broadcasting Company 86. Among their artists are Fritz Kreisler, Kirsten Flagstad, Nelson Eddy, Nathan Milstein.

Miscellaneous

Another source of income is the charge made by some radio stations to those who visit the studios and/or its technical rooms. The outstanding example of such a charge is that made by N. B. C., which charges 40 cents per person for a guided tour through its New York City broadcasting station and studios. In 1935 approximately 20,000 persons were taken on such tours. (See Zits, Oct. 31, 193.

[fol. 140] Another source of income has been the N. B. C. Thesaurus Library established by the National Broadcasting Co. This makes available to the smaller stations and advertisers through a lease a composite recorded program of diversified music at a cost much less than live talent.

Radio stations (including those located within the State of Washington), in connection with the presentation of commercially sponsored programs, make charges for the use of musical instruments, rehearsal halls, and other accessories which are a part of the equipment of the broadcasting station. For example, in 1 year in Chicago the National Broadcasting Co. charged a flat rate of $100 per week from each account using the organ facilities of the station. Each client paid the round sum of $5,000 per year for the right to use this instrument. Some eight accounts used the organ for eight shows, and at the rate of $100 weekly paid $40,000 a year for rental of this particular type of musical instrument. (See Variety, Feb. 5, 1936.)

Indirect Sources

The benefits and income derived from the operation of a radio broadcasting station are not limited to the direct means heretofore described. Many of the broadcasting stations are owned by commercial concerns such as department stores, life-insurance companies, electrical-equipment concerns, radio manufacturers, automobile manufacturers, newspaper companies, etc., who use the broadcasting station as a means of enhancing their good will.

Those stations which deal in electrical and radio equipment receive the benefits of broadcasting in more tangible [fol. 141] form, since it promotes the purchase of equipment produced by them. In fact, the operation of broadcasting stations is of distinct benefit to the entire radio manufacturing industry in that people are constantly purchasing sets and those who have sets are constantly replacing them in

order to obtain the latest improvements in radio receiving sets.

Commercial concerns other than the electrical-equipment and radio-equipment concerns have operated radio stations in conjunction with their businesses. For example, Station WOR, in New Jersey, is owned by L. Bamberger & Co., Inc., a department store, and at stated intervals in the course of their broadcasts stress has been laid upon an announcement "L. Bamberger & Co., one of America's great stores, Newark, N. J."

Similar uses of radio broadcasting stations, for the purpose of advertising independent business enterprises owning the stations, are employed in the State of Washington.

The benefit derived from this form of advertising for which the department store pays nothing, is a separate advantage which cannot be estimated in financial returns.

A list of some of the stations owned and operated by commercial concerns is:

KSUN, owned and operated by the Copper Electric Co.
KOY, Nielsen Radio & Sporting Goods Co.
KTAR, Arizona Republic & Electric Equipment Co.
KFPW, Southwestern Hotel Co.
KARK, Arkansas Radio Equipment Co.
KFWB, Warner Bros. Broadcasting Co.
WTIC, Travelers Insurance Co.
KFBI, Farmers & Bankers Life Insurance Co.
WBZ, Westinghouse Electric & Manufacturing Co.
WNAC, Shepard Department Store.
KSTP, National Battery Broadcasting Co.
WJDZ, Lamar Life Insurance Co.
KFEQ, Scroggin & Co. Bank.
[fol. 142] KOIL, Monamotor Oil Co.
KGFL, Northwestern Auto Supply Co.
WHN, Marcus Loew Booking Agency.
WHAM, Stromberg-Carlson Telephone Manufacturing Co.
WGY, General Electric Co.
WTMJ, Milwaukee Journal Co.
WLW, Crosley Radio Service.
WJAR, Outlet Co. Department Store.
WTAQ, Gillete Rubber Co.

Station WLW, operated by the Crosley Radio Service, manufacturers radio sets and other mechanical equipment.

Their products are constantly advertised over radio station WLW in connection with its operation. As a result, a record number of sets were sold last year.

The Radio Corporation of America is a manufacturer of radios, equipment, etc. Its chief subsidiary, the National Broadcasting Co., operates and manages more than 12 radio stations which advertise the products of the Radio Corporation of America. In 1935 the Radio Corporation of America grossed $87,563,646, an increase of 13.3 percent over 1934, which was $77,300,112.

There are one hundred and eleven newspaper-owned radio stations. These stations have been found very useful in increasing the circulation of a newspaper.

The Milwaukee Journal Co., operators of radio station WTMJ, has said that a radio station is a valuable adjunct in stimulating the activities of a newspaper. Variety, September 2, 1935, reports the following:

"Radio Helps Sell Paper, Says WTMJ

"A question contest just completed by WTMJ, owned by the Milwaukee Journal has disclosed that in the case of this station, at least, radio is helping sell the Journal. Fifth in preferences of the outlet's programs was its news broadcasts, with replies coming from listeners indicating this factor and also that the news spots served to fill in when it was [fol. 143] impossible to get a paper. Several answers were directly to the point that the broadcasts increased the desire to see the Journal.

"Contest was put on to build afternoon audiences and to get information on the afternoon listeners for sales-promotion purposes. Various cash prizes were awarded to listeners answering questions and telling of their favorite WTMJ program."

George H. Payne, Federal Communications Commissioner, October 31, 1935, said:

"Advertisers are interested in selling goods and want entertainment only as it creates an audience to which they can address their patter."

John W. Elwood, vice president in charge of program development of the National Broadcasting Co., in an address

filed with the Federal Radio Commission, August 15, 1930, said:

"Radio is a show business, * * * But radio was and still is accepted essentially as a show—something to which one may turn as a diversion from the daily cares of business or the home. We look to it for music, for drama, for descriptions of important events, for daily vaudeville. * * * It (radio) is built upon bricks and mortar laid by musicians, literature, playwrights, and authors since the beginning of civilization. * * * What the public demands from radio is entertainment. * * * The person or institution failing to recognize that radio is essentially an entertainment medium is firing blank cartridges when it broadcasts. * * * Broadcasting, from a business angle, is the essential promotion agency of a great industry; namely, that of manufacture and sale of radio-receiving sets, speakers, and accessories.

* * * * * * *

"Let us not lose sight of the fact that there are nearly 600 radio stations in the country and that a relatively small percentage of the total time on the air is devoted to education per se. The licenses (to operate radio stations) are granted with the requirement that the authorized stations operate to the public interest, convenience, and necessity. [fol. 144] There are undoubtedly many programs broadcast which would be difficult to recognize as coming within any of these classifications."

The Per Piece Basis for Paying Composers Is Not Practical

Justice Parker, in his report (Mar. 22, 1935) said:

"* * * The logical basis, of course, would have been to make individual charge for each performance of each individual work, but this basis had been found in European countries not to be practicable. Owing to the fact that the joint repertoire of the several societies was so large, and the use of it by the music users so frequent, it would have been necessary for the societies to prepare thousands of different prices for the many classes of works for their use in many different types of establishments, to numberless sizes of audiences, but in particular it would have been necessary for the music user and the societies to prepare and check

expensive and troublesome accounts of the works performed and of the length of times of performances, and of the numbers of the audiences, in order to reckon the amount due, greatly increasing the cost of the societies' operations and greatly increasing the necessary fees. In other countries all this was seen to be unnecessary as soon as the scope of the societies' repertoire was recognized; as soon as the music user came to realize that of the works he desired to perform in his performances a large part, and in some cases practically all, were works controlled by the societies. There has, therefore, come into use in other countries a license permitting performances at will, to any extent, from the joint repertoire of the societies, that is to say, a right of user license."

In addition to these observations, a per-piece system would require the maintenance of a detective force to supervise the over 30,000 establishments in the United States which use music, to make certain that under the license for a solitary number, the establishment does not pirate compositions not under license. The cost of maintaining a corps of in- [fol. 145] vestigators, the cost of maintaining a staff of listeners-in to cover some 600 radio broadcasting stations would entail an annual expenditure in excess of $2,000,000, an undertaking so prohibitive as to either force the Society to disband or to make license fees so absolutely exorbitant as to make it impossible for the establishment to operate.

The fact of the matter is that no other group of users has ever requested a per-piece arrangement. No user has ever expressed the desire for any single number, or group of numbers, or a catalogue of numbers. The first suggestion came in 1932 from some members of the radio industry. The industry itself has never been unanimous in support of any such suggestion.

Night clubs and dance halls, cabarets, restaurants, hotels, and motion pictures keep no logs of music use. Under the Federal Communications Act all that the radio stations are required to report to the Commission is the general nature of the programs, that is, whether they are drama, music, speeches, etc. The log kept in that manner is conceded to be worthless as a basis for any per-piece system. Very few stations keep their radio logs, and whatever logs are kept are inaccurate.

Even in the case of larger stations, which presumably have the staff to keep a record of the compositions played experience has shown that they fail to record and report properly. Thus, in 1935 the Columbia Broadcasting Station, the second largest broadcasting company in the United States, failed to include in its log a composition which was played by the Philadelphia Symphony Orchestra. The composition did not appear on any of the logs furnished, and it [fol. 146] was only after several inquiries by the copyright owner, who was not a member of the Society, that it was ascertained that the composition was broadcast as a request number by way of an encore, and therefore did not appear on the log.

Comparisons made between the logs of the stations and the numbers as taken down by various persons disclose many omissions and errors.

Smaller stations are opposed to the per piece system because of the tremendous expense and hardship which would be imposed upon them.

Thus, an owner of one of the smaller radio stations, station KLUF, located in Galveston, Tex., wrote the Society as follows:

"* * * I wish to add a word or two in regards to any future change of charges, such as I have read in Broadcasting—there seems to be a move on to change the manner in which they copy 'rite' fee shall be—favorable comment about charging so much per piece broadcast—this would be a distinct hardship upon us, because our force is very limited, and this would necessitate more clerical work which we are not prepared to undertake, and while it is sometimes hard to pay your price per month, still it is much easier than to do any other way—at least I think so."

Owners of larger stations have likewise opposed the per piece system. Thus, Isaac D. Levy, of WCAU, part of the Columbia Broadcasting chain, in the magazine Broadcasting, stated in no uncertain terms his opposition to the per piece system as being practically impossible of operation.

Even in the matter of reporting the sums of money, which is by far a simpler operation than the recording of the musical compositions, many stations have failed to accurately report the moneys received by them, so that the [fol. 147] share to be given to the Society could be ascer-

tained. A fair percentage of the broadcasters have failed to report on the actual income due to the Society and have been arbitrary in their attitude.

There is no way of placing a value upon the performing rights of a single number or a group of numbers, or even of the numbers of an entire catalogue of a particular music publisher. Each number has an entirely different value. Many factors must be taken into consideration, such as the celebrity of the composer, the popularity of the song, the frequency of repetition, the nature of the use, whether for radio, dance hall, motion picture, cabaret, hotel and night club, the size of the orchestra, the number of people witnessing or listening to the performance, the direct or indirect profit made by the user from the performance, the particular numbers played to make a complete program, and a host of other factors. The State Statute makes no provision for such factors and differences.

The Statute, while ostensibly drawn to provide for a compulsory per piece system, is actually designed and must inevitably lead to the destruction of complainants' rights, for the reason that no per piece system is possible. No records can be kept which will insure payment upon such system, for in order to keep such records a tremendous burden would be imposed upon the users of musical compositions in the State of Washington.

Many of these users (including users in the State of Washington) pay very nominal license fees to the Society, some as low as $30.00 a year.

[fol. 148] It will cost a great deal more than that for these users to install a system of bookkeeping and accounting that would have to be installed under a per piece system.

The amount now paid by users in Washington would not be sufficient to reimburse complainants and others similarly situated for the necessary expenditures that they would have to make in order to investigate and check up on individual uses of their compositions as well as the necessity for the employment of accountants to examine reports from users and ascertain whether payments have been made honestly or otherwise.

Although the State Statute purports to give to complainants and others similarly situated the right to fix a price per piece for the public performance for profit of their copyrighted musical compositions, within the limits of the Stat-

ute, even that right is taken away from them by the Statute if it should be found that any other group has given any other user in any other State a right to publicly perform for profit the compositions in their respective catalogues at a different rate.

The Statute not only attempts a system of compulsory price-fixing, but reaches out extraterritorially and seeks to set up as a standard, rates fixed by others in other states.

Moreover, it makes complainants and others similarly situated responsible for the acts of others over whom they have no control, which means that for all practical purposes, that in order to fix a rate in Washington, complainants and others similarly situated would have to go to the expense of ascertaining throughout the entire forty-eight states and [fol. 149] throughout 30,000 places of amusement and among over 1,000,000 copyrighted musical compositions, what rates have been fixed by others, and whether such rates are for compositions that compare or are of like value.

Many request numbers are played as spontaneous encores in the course of an evening's entertainment in dance halls, cabarets, hotels, etc. and occasionally on radio. This is possible only under some form of blanket license. Blanket licenses allow radio stations to make last minute substitutions, made necessary by operating difficulties, failure of artists to show up, etc.

It is difficult to report accurately music used, the writers, publisher and copyright owner of each. Large stations with expert staffs are unable to report entirely accurately, and it is inevitable that small stations would have greater difficulty because of lack of facilities.

By the use of the reservoir of available music, under a blanket license, there are saved expenditures that would be entailed if each musical composition had to be separately applied for and cleared and reported.

Apart from broadcasting, the Society has been unable to procure any return as to the compositions played by the user. In some cases, music is played by ear; in others, the performers themselves cannot or will not supply the details.

The amounts paid to the Society by the users of music in Washington for the public performance for profit of all the musical compositions of approximately 44,000 composers, average for 1936, approximately:

[fol. 150] Radio broadcasters, $2,315.00 per year, per station.

Motion picture theatre exhibitors, $45.00 per year, per theatre.

Restaurants, $34.00 per year, per establishment.

Hotels, $73.00 per year, per hotel.

Dance halls, $13.00 per year, per dance hall.

Miscellaneous establishments, $19.00 per year, per establishment.

If these establishments were required to maintain a system of inspection and accountancy and bargaining for each composition and to report the same, the expense which would be imposed upon each establishment for such purposes would obviously greatly exceed the average license fee paid by such establishment to the Society.

About six or seven years ago, Warner Bros. Pictures, Inc., an outstanding producer of motion pictures, purchased the entire stock interest of a number of well known music publishing firms in New York, the principal ones being M. Witmark & Sons, Harms, Inc. and Remick Music Corporation. These companies were approximately of the same size as the complainant, Irving Berlin, Inc. Warner Bros. paid $11,000,000 for the ownership of these corporations. That gives some indication of the value of the catalogues of the three publisher complainants herein, all of which are prominent publishers—Irving Berlin, Inc., one of the leading publishers of popular music, Carl Fischer, Inc., and G. Schirmer, Inc., being two of the leading publishers in the country of classical and standard musical compositions.

[fol. 151] The reason why an order to show cause is prayed for is because the State Statute will take effect on June 14, 1937. If the operation of the Statute is not restrained prior to that time, complainants will be compelled to forego their valuable rights under their contracts by threat of forfeiture and confiscation, as well as threat of the enforcement of the criminal provisions of the Act.

Wherefore, I respectfully pray that a temporary injunction issue, as prayed for in the bill of complaint.

Gene Buck.

Sworn to before me this 19th day of May, 1937. Marion L. Elkin, Notary Public, New York County. N. Y. Co. Clk. No. 103, Reg. No. 9 E 95. Bronx Co. Clk. No. 11, Reg. No. 48 E 39. Kings Co. Clk. No. 22, Reg. No. 9090. Commission expires March 30, 1939.

[fol. 152] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF WALTER S. FISCHER—Filed May 28, 1937

Walter S. Fischer, being duly sworn, deposes and says:

I am President of Carl Fischer, Inc., one of the complainants herein, and have been associated with that com-
[fol. 153] pany for thirty-eight years. The firm was founded by my father in 1872.

I reside at Darien, in Fairfield County, State of Connecticut.

Carl Fischer, Inc. is one of the largest publishing houses of classical music in America, whose principal place of business has always been and still is in the City, County and State of New York.

Over the years it has published many thousands of musical compositions. At the present time a substantial portion of these is still being published and most of these Compositions are protected by United States copyrights.

I have read the affidavit made on behalf of Irving Berlin, Inc., one of the complainants, and believe that the statements therein contained with respect to the conduct of the music publishing business and the hardships that would be entailed if the State Statute of Washington were enforced, are true and correct, and apply with equal force to this complainant.

The catalogue of this complainant depends upon the value of the copyrights and the rights which the complainant enjoys under the Copyright Act, and if the State of Washington seizes all of the complainant's copyrights as provided in said Statute, its entire business will be irreparably injured.

Complainant publishes standard and classical music as distinguished from popular music, its musical compositions have a perennial appeal, and there is always a very substantial demand for them. It publishes orchestrations and band music, chamber music, vocal and instrumental music,
[fol. 154] choral works, cantatas, symphonic works and books of instruction for all instruments, and musical compositions written and composed by eminent musicians, and

expends moneys far in excess of $10,000 per annum to advertise and exploit its musical works in the United States, and has expended over $500,000, during the last sixty years, in advertising and exploitation. It expends far in excess of $10,000 per year for arrangements, and employs many arrangers for the purpose of making various arrangements of its compositions.

The gross business done by this complainant has been very substantial for upwards of sixty years. For the year 1936, the gross business amounted to a substantial sum, far in excess of $150,000, and for the past five years, it has averaged far in excess of $100,000 per year. The net profits for the year 1936 were in excess of $25,000, and the average net profits per year, during the past five years, have been in excess of $25,000.

Complainant's contract with the American Society of Composers, Authors and Publishers, which expires on December 31, 1940, a copy of which is annexed to the complaint, was lawful in the State of New York, when made, and is presently in full force and effect and is of great value to this complainant; under this contract, this complainant received from the Society a sum in excess of $50,000 during each of the past five years, and will continue to receive sums in excess of $50,000 for each year during the balance of said contract period, and the value of this contract to this complainant is in excess of $200,000.

The catalogue of this complainant has a present value, in my opinion, greatly in excess of $1,000,000 which I base [fol. 155] upon the factors considered in fixing the value of a catalogue such as the size and extent of the catalogue, the previous earnings of complainant, the amount received from the Society, the gross business done by complainant and the amount received by prominent publishing firms upon the sale of their own catalogues within the past seven or eight years.

Complainant has commitments on real estate holdings and leases far in excess of $20,000 annually, for many years to come which would be seriously disturbed by the attempted enforcement of the State Statute.

If complainant were to attempt to comb its entire catalogue and endeavor to ascertain a per use value on each of its compositions, with respect to the many varied circum-

stances which must be considered in fixing such values, a vast amount of research work would be entailed and complainant would be compelled to expend large sums of money, in my opinion, an amount in excess of $25,000. Even after the expenditure of such an amount there would be no assurance that the data would be complete or accurate.

Complainant also copyrights many of its musical compositions under Section 11 of the Copyright Act, and the rights and privileges which it possesses under said Act would be interfered with by the enforcement of this State Statute.

Walter S. Fischer.

Sworn to before me this 18th day of May, 1937. Marion L. Elkin, Notary Public, New York County. N. Y. Co. Clk. No. 103, Reg. No. 9 E 95. Bronx Co. Clk. No. 11, Reg. No. 48 E 39. Kings Co. Clk. No. 22, Reg. No. 9090. Commission expires March 30, 1939.

[fol. 156] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF SAUL H. BORNSTEIN—Filed May 28, 1937

Saul H. Bornstein, being duly sworn, deposes and says:

I am the Treasurer of Irving Berlin, Inc., one of the complainants herein, and have been associated with that [fol. 157] company for 18 years.

I reside at No. 14 East 75th Street in the Borough of Manhattan, City and State of New York.

I have been in the music business for the past 20 years, and have a thorough and intimate knowledge of the business and a wide acquaintanceship with all the leading authors, composers and publishers, and am familiar with the customs and usages of the business and with the manner of its operation.

Irving Berlin, Inc., is one of the largest music publishing houses in America. It has been engaged in business for upwards of twenty years, and its principal place of business is in the City, County and State of New York.

This corporation has contracts with a great many prominent and successful authors and composers besides which it has the exclusive right to publish the works of Mr. Irving Berlin. Over the years, it has published and copyrighted thousands of musical compositions, many of which have been extremely successful.

The ownership in these musical compositions and in the copyright thereof constitutes the catalogue of Irving Berlin, Inc. The entire business of this company depends upon the size of the catalogue, its entertainment value, the prestige of the writers and composers, the public demand for particular compositions, the permanency of such demand, and other elements, all of which go to make up the value of the catalogue, and, of course, the value of the business. The entire value of the catalogue and the business [fol. 158] depends upon the right of Irving Berlin, Inc., to exercise all the exclusive rights granted to it under the Copyright Law with respect to these compositions. Anything that interferes with the right of this complainant to exercise the rights granted to it under the Copyright Act with respect to each and every one of these compositions or to the catalogue as a whole, adversely affects the business of the complainant.

During the many years that this complainant has been in business, it has expended large sums of money in exploiting its compositions. Each year it has expended far in excess of $25,000 for the purpose of making these compositions well known, popular and pleasing to the public in an effort to create a demand for its catalogue. In the aggregate, this complainant has expended far in excess of $250,000 for that purpose.

The gross business done by this complainant during the past 18 years has been very substantial. The average net profits for the past 5 years have been greatly in excess of $25,000 a year.

In 1936, this complainant entered into a renewal contract with the American Society of Composers, Authors and Publishers, which expires on December 31, 1940 (which is identical in form with the contract Exhibit "B" attached to the complaint herein). That contract was lawful in the State of New York when it was made, and is presently in full force and effect, and is of great value to this complainant. Under that contract this complainant received, in 1936, a sum of money in excess of $50,000 from the Society by way

of royalties; and this complainant has received a sum many times in excess of $50,000 from said Society during each [fol. 159] of the past five years, and will continue to receive sums in excess of $50,000 yearly for the balance of said contract period and the value of this contract to complainant is in excess of $200,000.

The catalogue of this complainant has a present value, in my opinion, far in excess of $1,000,000 based upon the factors considered in fixing the value of a catalogue such as the size and extent of the catalogue, the previous earnings of the corporation, the amount received from the said Society, the gross business done by the corporation, and the amount received by other prominent publishing firms upon the sale of their catalogues within the last seven or eight years.

The catalogue of this complainant depends upon the value of the copyrights and the rights which the complainant enjoys under the Copyright Act, and if the State of Washington seizes all of the complainant's copyrights as provided in such statute, its entire business will be irreparably injured and many of its employees might be thrown out of employment.

Complainant has commitments on leases in excess of $20,000 per year for some years to come which will be seriously disturbed by the attempted enforcement of the Statute.

The State Statute attempts to modify the complainant's existing contract with the American Society by compelling this complainant to fix a price per use for each one of its musical compositions performed in the State of Washington.

Since the complainant's contract with the said Society is a valid and subsisting contract, the complainant is in no position to come into the State of Washington free of any combination and comply with the said Statute. It is in a [fol. 160] position where it is declared by the State of Washington to be operating illegally and unlawfully against its Statute unless prices are fixed.

In view of its existing contract, the complainant has no alternative but to come into the State of Washington and file a list of its copyrights and accept a price fixed by said State per piece per use—a price which, under the Statute, may not be less favorable than a price fixed in the other States. Inasmuch as there is no such fixed price in any

other State, there is no standard upon which a price can even be fixed within the State of Washington. Therefore, this complainant is left to the arbitrary whim and caprice of the State officials of Washington. Complainant must either accept the price fixed by such State officials or run the risk of having its entire catalogue of copyrights seized by the State as provided in the Statute.

To comply with the State Statute with respect to the filing of a list of assignments is a very costly proposition. This complainant has never yet been required to file any such list anywhere and under the Copyright Act as well as the laws of the respective States other than Washington (a similar statute has recently been passed in the State of Montana), no such requirement exists.

Complainant in the usual and ordinary course of its business, keeps up a list of its musical compositions which are currently popular and active, for which there is a demand. When it is found necessary to look up inactive and old compositions, separate search with respect to such numbers is required, entailing inquiry as to present copyright, licenses, renewals, foreign grants and other matters. Search is [fol. 161] required in the Copyright Office, and frequently inquiry as to the whereabouts of persons interested in the copyright or rights therein. This involves considerable effort and expense. For that reason, no complete list is maintained of complainant's copyrights for usual, daily business requirements. Moreover, since complainant, as a publisher, is primarily interested in the publication of the compositions as such, there is no necessity for keeping up a detailed record of other rights in these compositions. Even as to current songs in the catalogue, where it becomes necessary to dispose of other rights, such as stage rights, rights of synchronization in motion pictures, and foreign rights, separate searches are necessary.

To compile a list of this vast catalogue would necessitate ascertaining the exact date of copyright registration of each composition controlled by the complainant, going back for a great many years, possibly as many as 56 years; there must be inquiry with respect to each copyright as to who is entitled to renewal; information must be secured as to each copyright with respect to whether or not there has been any assignment (and in many instances, there are assignments); it must also be ascertained what rights exist with respect to

such copyrights in foreign countries; also, whether or not particular limited rights have been granted, carved out or retained; whether any license agreements were made with respect to particular copyrights with any person, firm or corporation throughout the world, or for a particular territory. Moreover, this list must be supplemented each month, and an entirely new list filed each year.

[fol. 162] To attempt to ascertain the abovementioned information, to collate it and to keep it accurate and up to date, would involve this complainant in an expenditure far in excess of $25,000, because it would entail the services of a large staff of clerks and investigators; searches would have to be made in the Copyright Office by trained and skilled persons; lawyers would have to be employed and consulted with respect to all these matters, including the foreign rights; and in many cases, there would be, as there have been in the past, conflicting claims which would have to be ironed out. Consequently, at best, it would be a tremendous and costly task to obtain this information and to make a list and keep the list accurate; and the Washington Statute requires that this list be complete and accurate and supplemented each month, otherwise, the complainant would be subject to the penalties of the Statute.

It is to be borne in mind that with respect to these musical compositions, there are arrangements being made from time to time. A popular composition has not only a piano arrangement, but it has an orchestral arrangement,—a separate arrangement for each instrument of the orchestra. Very frequently, new arrangements of very popular compositions are made from time to time, particularly, with respect to time and rhythm; sometimes quartettes, trios and duets are arranged; sometimes arrangements for special vocal parts. Each of these arrangements is copyrighted separately, as is the custom in the music business, and as required by the Copyright Act, and each arrangement may have a separate history with respect to license, ownership, [fol. 163] restrictions and foreign rights, as well as renewals.

Frequently, on renewals, where the author or composer has died, the widow or other person entitled to the renewal under the Copyright Act, goes to another publisher and continues the publication of the composition with such new publisher, granting to such new publisher the same rights which

had theretofore been granted to the publisher under the original term, including the assignment of the renewal term of the copyright.

In many instances, this complainant, Irving Berlin, Inc., has acquired the renewal term of copyright. It is unable, however, in such cases, to ascertain the prior history, under the original term of copyright, to find out what grants have been made, what licenses given, the scope and extent thereof, the countries and territories which have been carved out therefrom, and all the other data necessary and requisite to comply with the State Statute.

Since, under the Statute, complainant would be required to list each one of these separate copyrights, the added expense to the complainant would be very substantial.

As to fixing a price per use: There are all sorts of uses and all sorts of places where the uses are made. All of these factors must be taken into consideration for the purpose of arriving at a true estimate of the use value of a composition. There must be constant investigation into the manner in which a particular composition is used, including investigation of the places where the music would be used, the nature of the use, the character of the artists involved in the performance, the extent of the use, the nature of the [fol. 164] audience reached. To properly ascertain such information, a very considerable sum of money would have to be expended by the complainant with respect to each of its musical compositions, and the cost of so doing, would, in my opinion, far exceed $25,000.

Moreover, there is a vast difference between the value of the various songs in the catalogue. Some are currently popular, some are not; and it would be a very difficult matter, in fact impossible, to ascertain with any degree of certainty, a true use value for each of our compositions.

Under the State Statute, it is mandatory that the complainant fix a use value upon each of its compositions. That would mean that the complainant would be compelled to comb its entire catalogue and endeavor to estimate a use value on each of its compositions.

I respectfully submit that this would require the services of musical experts, as well as legal experts, and would require a vast amount of research work and the expenditure of large sums of money; in my opinion, an amount far in excess of $25,000.

Furthermore, to enforce the State Statute would work a terrific hardship with respect to a great many musical compositions now owned by the complainant. For example: the complainant frequently copyrights musical compositions which it does not publish for a long time thereafter. This is done as a matter of sound business judgment, and is a recognized custom in the trade; and Section 11 of the Copyright Act recognizes the necessity for securing copyright on these compositions before publication, and provides that this may be done.

[fol. 165] Under the State Statute a user in Washington could, in the event a musical composition is copyrighted under Section 11 (which means before publication), insist upon his right to use that particular composition upon a price-fixing basis. If the composition were sufficiently pleasing and attractive, other users would demand the same privilege; with the result that the value of the work would be exhausted before publication, and the value of the composition to the complainant would be almost totally destroyed.

Moreover, the State Statute takes away from the complainant its control of its own business. It does not permit the complainant to exercise control over its business, but permits users in Washington to exercise control over the complainant's business.

The initial publication of a song is a very delicate and exacting operation, and is not as simple as might be supposed. A great deal of skill and judgment is necessary to ascertain the proper time for the publication of a song, to arrange for popularizing the song, to create an appeal on the part of the public by having initial performances of a high calibre done by famous orchestras performing in theatres and elsewhere, and very often a great deal of publicity must be provided for the song and it must be advertised in a manner to attract favorable attention.

Moreover, the complainant, having copyrighted a work under Section 11, refrains from publishing the song to preserve other property in addition to the song. Many songs are performed, for the first time, as part of an elaborate musical show, musical comedy or operetta and works of [fol. 166] similar nature. Obviously, such dramatic works, some of which represent an expenditure of hundreds of thousands of dollars in cost of production, must be protected. If the music is indiscriminately broadcast and per-

formed prior, or during the run of a production, it means that the public will have been surfeited with it and the demand for the song will have been exhausted. Thus the production in which the song appears will lose appeal and may become a failure.

For the foregoing reasons, a custom has grown up in the American Society, over many years, whereby owners of copyrights, like the complainant, have the right to restrict from radio broadcasting, musical compositions currently being played in important productions.

Under the State Statute of Washington, it would be impossible to protect a musical production whose cost to the producer is sometimes as great as $300,000 (cost of producing such musical plays is invariably between $200,000 and $300,000); and consequently, not only the complainant, but producers of plays using its musical works, throughout the country, would be at the mercy of the user of a particular piece.

Very often the "hit" number of an important production is a song which complainant owns, and which has been interpolated in such a musical production as a separate number. For this the complainant receives special compensation. But that is done only when the complainant is able to assure the producer that the song will not be broadcast or otherwise performed during the run of the show, and possibly, even during subsequent periods, when motion pictures or [fol. 167] road-shows are in progress, based upon such production. That valuable right is likewise destroyed by the State Statute for the reasons above explained.

Complainant, standing alone, is helpless to detect infringements throughout the country of its copyrights. Its songs may be performed simultaneously in over 30,000 establishments throughout the United States, and the cost of detecting infringement and bringing suit would far exceed any royalties that it might collect and certainly would exceed $25,000 for the State of Washington alone. Infringers habitually challenge the title of complainant, the originality of the work, deny giving performance, deny performance was for profit and in other ways attempt to evade liability. They manoeuvre for delay and often succeed in postponing trials for three and four years. In the meantime, many establishments, thus sued, go out of business, and complainant is left without remedy. Such defense and such tactics require vigorous and able prosecution by skillful lawyers

well versed in the law of copyrights. This likewise entails large expense which can hardly be compensated for in the statutory damages and modest counsel fees awarded in cases where judgments are obtained and collected.

It is only through an organization like the Society that these rights of complainant may be adequately protected.

The State Statute itself recognizes the lawful nature of the Society and its convenience to users by permitting the continued licensing of rights through the Society by attempting to fix the prices of such licenses on a per use system. [fol. 168] The State Statute would continue the benefits of the Society to the users, but would destroy the benefit of the Society to this complainant and others similarly situated.

Saul H. Bornstein.

Sworn to before me this 18th day of May, 1937. Marion L. Elkin, Notary Public, New York County. N. Y. Co. Clk. No. 103, Reg. No. 9 E 95. Bronx Co. Clk. No. 11, Reg. No. 48 E 39. Kings Co. Clk. No. 22. Reg. No. 9090. Commission expires March 30, 1939.

[fol. 169] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF GUSTAVE SCHIRMER—Filed May 28, 1937

Gustave Schirmer, being duly sworn, deposes and says:

I am Secretary of G. Schirmer Inc., one of the complainants herein, and have been associated with that company [fol. 170] for over thirty years.

I reside at No. 812 Park Avenue, in the Borough of Manhattan, City and State of New York. G. Schirmer Inc., is one of the largest publishing houses of classical music in America, whose principal place of business has always been in the City, County and State of New York.

Over the years it has published many thousands of musical compositions. At the present time a substantial portion of these is still being published and most of these compositions are protected by United States copyrights.

I have read the affidavit made on behalf of Irving Berlin, Inc., one of the complainants, and believe that the statements therein contained with respect to the conduct of the music publishing business and the hardships that would be entailed if the State Statute of Washington were enforced, are true and correct, and apply with equal force to this complainant.

The catalogue of this complainant depends upon the value of the copyrights and the rights which the complainant enjoys under the Copyright Act, and if the State of Washington seizes all of the complainant's copyrights as provided in said Statute its entire business will be irreparably injured.

Complainant, G. Schirmer Inc. publishes standard and classical music as distinguished from popular music, and its musical compositions have a perennial appeal; there is always a very substantial demand for them. It publishes choral works, cantatas, symphonic works, books of instruction to music students and musical compositions written and composed by eminent musicians; it expends far in ex- [fol. 171] cess of $10,000 per annum to advertise its musical works in the United States, and has expended over $100,000 during the last thirty years in advertising. It expends in excess of $10,000 per year for arrangements, and employs many skilled and experienced arrangers for the purpose of making various arrangements of its compositions.

The gross business done by this complainant has been very substantial for upwards of thirty years. For the past five years it has averaged in excess of $150,000 per year.

Complainant's contract with the American Society of Composers, Authors and Publishers, which expires on December 31, 1940 (which is similar to the contract of Carl Fischer, Inc., annexed to the complaint herein), was lawful in the State of New York, when made, is presently in full force and effect, and is of great value to this complainant; under this contract, this complainant received from the Society a sum in excess of $50,000 during each of the past five years, and will continue to receive sums in excess of $50,000 for each year during the balance of said contract period; and the value of this contract to this complainant is in excess of $200,000.

The catalogue of this complainant has a present value, in my opinion, far in excess of $1,000,000. Some of the factors to be considered in fixing the value of a catalogue

are the size and extent of the catalogue, the previous earnings of the corporation, the amount received from the Society, the gross business done by the corporation and the amount received by prominent publishing firms upon the sale of their catalogues within the past seven or eight years. Applying this yardstick I believe that the value of the cata- [fol. 172] logue of this complainant is as above stated. These would be seriously disturbed by the attempted enforcement of the Washington Statute.

If this complainant were to attempt to comb its entire catalogue and endeavor to ascertain a per use value on each of its compositions, a vast amount of research work would be entailed, and complainant would be compelled to expend large sums of money, in my opinion, in excess of $25,000. Even after the expenditure of such an amount, there would be no assurance that the data would be complete or accurate.

This complainant also copyrights many of its musical compositions under Section 11 of the Copyright Act, and the rights and privileges which it possesses under said Act would be interfered with by the enforcement of this State Statute.

Gustave Schirmer.

Sworn to before me this 18th day of May, 1937. Marion L. Elkin, Notary Public, New York County. N. Y. Co. Clk. No. 103, Reg. No. 9 E 95. Bronx Co. Clk. No. 11, Reg. No. 48 E 39. Kings Co. Clk. No. 22, Reg. No. 9090. Commission expires March 30, 1939.

[fol. 173] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF ANNE PAUL NEVIN—Filed May 28, 1937

Anne Paul Nevin, being duly sworn, deposes and says:

I am one of the complainants herein, and the widow of Ethelbert Nevin, who departed this life in 1901. He was [fol. 174] a pianist and composer, and his memory is one of the bright spots in American music. He was born in 1862 in Edgeworth, Pa., and in his comparatively short

life he composed some of the most famous songs in this nation. To have done nothing else than to have composed "The Rosary" and "Mighty Lak a Rose" would have been sufficient to have established his reputation.

In his lifetime, my husband never received any money whatever from the public performance for profit on his copyrighted musical compositions. It was not until I joined the American Society, long after his death, that I began to benefit from the royalties from the licensing for public performance for profit on his compositions.

With respect to many of the copyrights, the original term has expired and I have renewed the term of the copyrights in my name as his widow, pursuant to the provisions of the Copyright Act.

I have been receiving substantial royalties from the Society, and since 1928 I have received in excess of $4,000 each year from the Society as my participation in the licensing for public performance for profit of my husband's songs. This is a very substantial sum of money to me, and were it not for the Society I would not be in receipt of anything for these public performing rights. I depend for my livelihood chiefly upon this income from the Society.

Herewith is a list of the various works that my husband wrote from 1874 down to the time of his death, as well as the posthumous works published after his death, with the years in which they were published:

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1874

Lilian Polka ..... Piano

1880

Apple Blossoms ..... Song and Dance

1881

The Lovers (In the garden were leisurely walking) ..... Song
The Milk Maid (Shame upon you, Robin) ..... Song

1886

I once had a sweet little doll, dears ..... Song
Stars of the summer night ..... Song
Summer Longings (Ah! My heart is weary waiting) ..... Song
When all the world is young, lad ..... Song

1887

Bed-time Song (Sway to and fro in the twilight gray) ..... Song
Cradle Song (Sleep, baby, sleep) ..... Song

1888

Op. 2, Sketch Book:

1. Gavotte ..... Piano
2. Im wunderschonen Monat Mai ('Twas in the lovely month of May) ..... Song
3. Love Song ..... Piano
4. Du bist wie eine Blume (Oh! fair, and sweet and holy) ..... Song
5. Berceuse ..... Piano
6. Lehn' deine Wang (Oh! let thy tears fall fast with mine) ..... Song
7. Serenata ..... Piano
8. Oh! that we two were maying ..... Song
9. Valse Rhapsodie ..... Piano
10. In winter I get up at night ..... Song
11. Of speckled eggs the birdie sings ..... Song
12. Dark brown is the river ..... Song
13. The night has a thousand eyes ..... Mixed chorus and violin obbligato

Op. 3, Three Songs:

1. Deep in a rose's glowing heart ..... Song with violin and 'cello obbligati
2. One spring morning ..... " " "
3. Doris ..... " " "

Serenade (Good-night, good-night, beloved) ..... Song

May Day Dance ..... Unison chorus, with piano 4-hand acc.

[fol. 176]

1889

Op. 4, Five Songs:

1. Herbstgefuhl (Autumn sadness) ..... Song
2. Chanson des Lavandieres (What care I, unwilling) ..... Song
3. 'Twas April ..... Song
4. Raft Song (From upwards my raft drifts down) ..... Song
5. Before the daybreak ..... Christmas Carol

The Earth has Grown Old ..... Christmas Carol

Everywhere, Everywhere, Christmas Tonight ..... Christmas Carol

Wynken, Blynken and Nod ..... Solo and chorus of mixed voices with piano 4-hand acc.

1890

Op. 6, Three Duets for the Piano:

1. Valse Caprice ..... Piano, four hands
2. Country Dance ..... " " "
3. Mazurka ..... " " "

Op. 7, Four Pieces:

1. Valzer Gentile ..... Piano
2. Slumber Song ..... Piano
3. Intermezzo ..... Piano
4. Song of the Brook ..... Piano

Jesu, Jesu, Miserere ..... Sacred Song

The Silent Skies are Full of Speec ..... Christmas Carol

Nunc Dimittis ..... Mixed Voices

Benedictus ..... Mixed Voices

Jubilate ..... Mixed Voices

1891

Op. 8, 1. Melody ..... Violin and Piano
2. Habanera ..... Violin and Piano
Une Vieille Chanson (If a lovely lawn there be) ..... Song
Barcarolle (The crimson glow of sunset fades) ..... Men's Voices

Op. 12, Five Songs:
1. A Summer Day ..... Song
2. Beat upon mine little heart ..... Song
3. In a Bower ..... Song
4. Little Boy Blue ..... Song
5. At Twilight ..... Song

Op. 13, Water Scenes:
1. Dragon Fly ..... Piano
2. Ophelia ..... Piano
3. Water Nymph ..... Piano
4. Narcissus ..... Piano
5. Barcarolle ..... Piano

[fol. 177] 1892

The Rhine and the Moselle ..... Chorus of Men's Voices

Op. 16, In Arcady:
1. A Shepherd's Tale ..... Piano
2. Shepherds All and Maidens Fair ..... Piano
3. Lullaby ..... Piano
4. Tournament ..... Piano

Op. 17, Three Songs:
1. Hab' ein Roslein (The Rosebud) ..... Song
2. Le Vase Brise (The Vase) ..... Song
3. Rappelle-toi (Remember well) ..... Song

Op. 18, Two Etudes:
1. In the form of a Romance ..... Piano
2. In the form of a Scherzo ..... Piano

1893

Barcarolle ..... Violin and Piano
Evening Song ..... Chorus of Mixed Voices
My Love ..... Chorus of Mixed Voices

Op. 20, A Book of Songs:
1. A Fair, Good Morn ..... Song
2. Sleep, little Tulip ..... Song
3. Ev'ry Night ..... Song
4. Airly Beacon ..... Song
5. When the Land Was White with Moonlight ..... Song
6. A Song of Love ..... Song
7. Nocturne (Up to her chamber window) ..... Song
8. Dites-moi (Tell me) ..... Song
9. Orsola's Song ..... Song
10. In the Night ..... Song

When Christmas Comes ..... Christmas Carol

1894

The Merry, Merry Lark ..... Song
La Vie (Life) ..... Song
Ti Saluto (Thine my greeting) ..... Song

1896

Op. 21, May in Tuscany:

1. Arlecchino ..... Piano
2. Notturno (In Boccaccio's Villa) ..... Piano
3. Barchetta ..... Piano
4. Misericordia ..... Piano
5. Il Rusignuolo (In my neighbor's garden) ..... Piano
6. La Pastorella (Montepiano) ..... Piano

Op. 22, Two Songs:

1. Rechte Zeit (Time enough!) ..... Song
2. Madel, wie bluht's (Maiden, how sweet) ..... Song

[fol. 178] 1898

The Rosary ..... Song
Life Lesson (There, little girl, don't cry) ..... Song
My Love's Waitin' ..... Song

Op. 25, A Day in Venice:

1. Alba (Dawn) ..... Piano
2. Gondolieri (Gondoliers) ..... Piano
3. Canzone Amorosa (Love Song) ..... Piano
4. Buona Notte (Good Night) ..... Piano

March of the Pilgrims, for the Knight Templars ..... Piano

1899

Op. 28, Songs from Vineacre:

1. A Necklace of Love ..... Song
2. Sleeping and Dreaming ..... Song
3. The Dream-maker Man ..... Song
4. Ein Liedchen ..... Song
5. My Desire ..... Song
6. The Nightingale's Song ..... Song
7. La Lune Blanche ..... Song
8. Ein Heldenlied ..... Song

Op. 29, Captive Memories ..... Bar. Solo, Solo Quartet and Reader; Song Cycle

Op. 30, En Passant:

1. A Fontainebleau ..... Piano
2. In Dreamland ..... Piano
3. Napoli ..... Piano

At Home (A June Night in Washington) ..... Piano

1900

Memorial Day ..... Mixed Voices

Posthumous Works

1901

An African Love Song.....Song
Mighty lak' a rose.....Song
To Anne.....Song
At Rest.....Song
The Woodpecker.....Song
The Four Seasons.....Mixed Voices

1902

O'er Hill and Dale
'Twas a lover and his lass.....Piano
The Thrush.....Piano
Love is a-straying, ever since maying.....Piano
The Lark is on the wing.....Piano
The Quest.....Cantata

1907

Sweetest Eyes were ever seen.....Song

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1909

Wedding Morn.....Song

1913

Marguerites.....Song
Rain Song.....Song
I Fear Thy Kisses, Gentle Maiden.....Song

A very complete account of my husband's life and works is to be found in the book entitled "The Life of Ethelbert Nevin" from his letters and his wife's memories, by Vance Thompson, published and copyrighted by the Boston Music Company in 1913.

If the Washington State Statute is enforced against me, I will lose the moneys that I receive from the Society, and will be without means of livelihood. I am 70 years of age, and I ask the protection of this Court of Equity to preserve me in my declining years against want and poverty, in memory of a man who has enriched this nation with his genius.

As evidence of the perennial appeal of my husband's works, "Mighty Lak' a Rose" was reported performed over the radio in 1935 over 6,000 times and "The Rosary" was reported performed over the radio that year over 3,000 times, including performances in the State of Washington. I have obtained these figures from the record furnished

to me by the Society, which in turn is furnished with it by the two principal radio networks. It does not purport to represent all of the actual performances given by radio broadcasters throughout the country. I have frequently heard many other songs of my husband's performed over the radio, but have found no report made on them by the broadcasters. These songs have all been performed within the State of Washington.

[fol. 180] Nevertheless, from these meagre reports it is apparent that the radio broadcasters are making a very substantial use of my husband's songs. Hotels, motion picture theatres, cabarets and dance halls make no record, so far as I know, of public performances of musical compositions, including my husband's, so that it is impossible to estimate the extent of such use. Alone and unaided, it would be impossible for me to license the public performance for profit of my husband's compositions. I have no financial resources for that purpose; I could not engage lawyers or investigators throughout the country, and I would be utterly helpless.

It is for that reason that I joined the Society, knowing that in the combined strength of those similarly situated, we could protect the public performance for profit of our works against piracy and infringement.

If the Washington Law should be enforced, it would make it impossible for the Society to operate in that State, and I and others similarly situated would be in the same position that my husband was in at the time that he died.

The practical effect of the Washington Statute is to give to selfish and powerful groups the right to exploit, without compensation, my husband's works and the works of other authors and composers.

The Copyright Statute carefully provided that the widow of an author was to have the first right to renew the original term of copyright. It was the public policy of the Government of the United States, realizing that authors pay much more attention to the creation of their works than to the business of obtaining money therefrom, to protect the widows and families of authors by that provision of the [fol. 181] Copyright Act. That beneficent provision and public policy of the Government would be utterly destroyed by the Washington Statute.

While I have obtained and furnished in this affidavit a list of the published songs my husband wrote, I am unable

and will be unable to present a complete list of the copyrights and of the various interests therein, without going to the expense of engaging an attorney and making inquiry both in the United States and in foreign countries, covering a period of over sixty years. An attempt to do so would cost me in excess of $5,000, which I cannot afford to spend.

Anne Paul Nevin.

Sworn to before me this 19th day of May, 1937. Marion L. Elkin, Notary Public, New York County. N. Y. Co. Clk. No. 103, Reg. No. 9 E 95. Bronx Co. Clk. No. 11, Reg. No. 48 E 39. Kings Co. Clk. No. 22, Reg. No. 9090. Commission expires March 30, 1939.

[fol. 182] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF DEEMS TAYLOR—Filed May 28, 1937

Deems Taylor, being duly sworn, deposes and says:

I am a composer and one of the complainants herein.

[fol. 183] I reside at Stamford, Connecticut.

I was formerly a music critic with the New York World, and have for several years past devoted myself almost exclusively to the composition of serious music.

In 1913 I wrote "The Siren Song", a symphonic poem which received a prize from the National Federation of Musical Clubs. And in addition to "Through the Looking Glass" (a suite from Lewis Carroll's "Alice In Wonderland", mentioned in the complaint), I also composed such choral works as "The Chambered Nautilus" and "The Highwayman" and a song cycle entitled "The City of Joy"; I also composed "The Portrait of a Lady", a symphonic poem "Jurgen" and a suite "Circus Day". I composed two grand operas "The King's Henchman" and "Peter Ibbetson", both of which were produced in the City of New York at the Metropolitan Opera House.

I also do a great deal of work upon the radio as a commentator, particularly in conjunction with the Philharmonic Symphony Orchestra.

A reference to my life and works is to be found in The New Encyclopedia of Music and Musicians by Waldo Selden Pratt (the MacMillan Company, 1935), and in An Outline of the History of Music by Karl Nef (Columbia University Press, 1935).

I am composing musical works at the present time and hope to continue to do so for the balance of my life.

My livelihood depends upon my ability as a composer, critic, reviewer and commentator and upon the demand for my works with the public.

[fol. 184] In the year 1930 I became a member of the American Society of Composers, Authors and Publishers, and for each of the past four years I have received annually in excess of $3,000 from said Society for the right which I gave to it to license users of music to publicly perform for profit my musical works and expect to receive a sum in excess of $4,000 annually for the balance of my contract with the Society and future contracts with it; the value of my contract with the Society is in excess of $15,000.

The amount that I receive from the Society is a very substantial part of my annual income. If I were required to issue individual licenses for the public performance of my works for profit throughout the United States, it would require engaging a large corps of employees, a large corps of investigators and accountants, lawyers and experts who would be qualified to determine the value of a particular use of a particular one of my musical compositions in a particular establishment. Considering that there are 30,000 establishments throughout the country, anyone of which might perform all or part of my works without notice to me, the burden imposed would compel me to completely forego the revenue that I receive at present from the public performance of my compositions, since it would cost me more than $5,000 to comply with the laws of the State of Washington, where there are more than 500 users of copyrighted musical works.

My annual income by way of royalties from the publishers of my musical compositions has averaged for the past ten years in excess of $500.00. I have received mechanical royalties for the use of my works in conjunction with phonograph records, piano player rolls at an average sum each [fol. 185] in excess of $100 for the same period.

If I should fail to comply with the provisions of the State Statute, my works would be confiscated and escheat to the State of Washington, and my income both from the exploitation of my works by way of sheet music, mechanical records, as well as my income from the Society, would be completely destroyed. If I were required to list all persons having any interest whatsoever in the many works composed by me over a lifetime, I would have to make a very long and extensive research; I would have to engage counsel to advise me as to my rights and the rights of all others claiming an interest therein; I would have to go into the complete history, both with respect to the rights in the United States and the rights abroad; it would be difficult to find the location of any persons who might appear to have an interest in my works, and the cost of so doing would certainly exceed the sum of $10,000.

It would be necessary to do all this to comply with the Washington Statute unless I were willing to risk a forfeiture of my works for the failure to comply with such Statute.

It has been my experience, as well as the experience of other composers in the country, that all users of music would pay the composer nothing for the public performance for profit of his music unless he is in a position to enforce his rights. Singly and individually I have never been in such a position and can never be in such a position, nor can any other writer or composer in the United States be in such [fol. 186] a position. It has been necessary to join the Society in order to prevent unlimited piracy of our works and in order that we may earn our livelihood and be repaid for the product of our brain and creative faculties.

The Statute attempts to place me, and other composers and writers, as well as publishers, in the same position that we were all in prior to the formation of the Society in 1914, when composers, authors and publishers in this country received nothing from the public performance for profit of their musical compositions. This is accomplished in an indirect manner under the Statute by penalizing me and others similarly situated if we join together to prevent piracy and to protect our interests. This is sought to be accomplished by imposing conditions which cannot reasonably be met, and the penalties for their non-compliance are quite drastic. As a matter of fact I cannot meet the de-

mands of the State Statute because I am now a member of the Society, and since I have a valid, subsisting and binding contract with the Society which is good until December 31, 1940, I cannot breach it. If I should attempt to grant individual licenses for the performance of my works in the State of Washington I would breach my contract with the Society and incur the penalties and damages given by law for breach of contract. On the other hand, if I abide by my contract with the Society I would then have to file a list to comply with the Statute and consent to a price-fixing of my compositions. The fixing of prices for my compositions would violate my contract with the Society because that contract is a relinquishment by me of all rights whatsoever for [fol. 187] the limited period of the contract with respect to the licensing of the public performance for profit of my musical compositions.

When I composed my musical compositions and secured copyright thereon, or permitted a publisher, in some instances, to secure copyright thereon (reserving other rights to myself), I did so with the knowledge that I would be given certain exclusive rights with respect to my works for a limited period, and that after the expiration of that period as fixed by Statute, all of my works would fall in the great reservoir of the public domain to be enjoyed free by the public henceforth. That to my way of thinking was the purpose and spirit of the Copyright Act. Encouraged by that Act, I have composed my works in the hope and expectation that I can during my lifetime obtain sufficient remuneration from my labors to support myself and my dependents. The State Statute deliberately flouts this purpose and destroys my expectations because it at once seeks to place the public performance for profit of my musical compositions in the hands of all users in the State of Washington who may use them at will and pay me a sum to be fixed by State officials, which sum cannot adequately be measured in proportion to the true value of my compositions. All this is done by the State of Washington under the pretext that it is acting in the public interest. I am sure that the public interest is best conserved if I am permitted and encouraged to bring forth the product of my creative brain so that at a future day the public may have it forever. [fol. 188] The Copyright Act itself has taken care of the true public interest, and it has provided in Section 28 that

all performances of religious or secular works, such as oratories, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir, or vocal society, may be given free of any royalties, provided the performance is given for charitable or educational purposes and not for profit.

The selfish group of radio broadcasters operating stations in the State of Washington, who have sponsored this inequitous bill, do not come within this section of the Copyright Act. Theirs is not a public interest but a selfish, private interest. They wish to enjoy the fruits of my labors for a pittance and deprive me of the ability to maintain myself for the purpose of creating music. They are not acting in the public interest, and the State Statute was not created in the public interest.

To demonstrate how absurd it is to even attempt to fix the value per use of any of my musical compositions and those of others similarly situated, the Copyright Statute itself, recognizing that there is no way of proving the damage for the violation by pirates of musical compositions, fixes a minimum damage of $250 for the piracy of such compositions. Congress in enacting this Statute, as I have been informed by eminent counsel, realized that such substantial damages are necessary in order to deter users from wilfully infringing such works. The only purpose of compelling an author to fix a price for a particular use of his composition [fol. 189] can be to evade the provision for minimum statutory damages and to grant an involuntary license so that the copyright owner who detects a particular infringement of his work can recover only a nominal sum, which would hardly compensate for the cost of investigating the infringement, let alone the counsel fees and other expenses necessarily involved.

Deems Taylor.

Sworn to before me this 19th day of May, 1937.
Marion L. Elkin, Notary Public, New York County.
N. Y. Co. Clk. No. 103, Reg. No. 9 E 95. Bronx Co. Clk. No. 11, Reg. No. 48 E 39. Kings Co. Clk. No. 22, Reg. No. 9090. Commission expires March 30, 1939.

[fol. 190] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF ELLA HERBERT BARTLETT—Filed May 28, 1937

[fol. 191] Ella Herbert Bartlett, being duly sworn, deposes and says:

I am one of the complainants herein, and the daughter of the late Victor Herbert, who has been referred to by music critics and by the public generally, as the leading and most gifted composer of music this country has ever had.

My late father devoted his life to music and to the musical profession. He went through many struggles and hardships in his younger days, and when success smiled upon him, he tried to help the writers and composers of America.

With the growth of the amusement and entertainment field, early in the twentieth century, my father realized that something would have to be done to obtain for these writers and composers adequate recompense for their labors and genius. He saw entertainment developing along the lines of pretentious cabarets, night-clubs and supper-clubs. He saw the restaurants presenting elaborate forms of musical entertainment, in addition to food. Yet, from none of these sources did a single penny come to the writer or composer.

My father was aroused by this injustice, and, in conjunction with other celebrated musicians, writers, composers and publishers of his day, he helped to organize the American Society of Composers, Authors and Publishers for the protection of the performing rights of those who created and published the music of the Nation. The test suit which won legal recognition of the rights of authors and composers was brought in my father's name—Victor Herbert vs. Shanley Co., 242 U. S. 591.

[fol. 192] Although my father served as a director and an officer of the American Society, he never asked for or recieved any compensation.

After his death in 1924, I was permitted to become a member of the American Society, and have been such member continuously since said time. I have participated in the royalties derived annually by the Society from perform-

ances of works composed by my father, and I have received, since 1924, varying amounts, averaging in excess of $4,000.00 per year. In the year 1936, I received by way of royalties the sum in excess of $9,000. I shall receive at least an equal amount from the Society this current year, unless the State Statute is enforced, in which event I shall suffer loss of this revenue. Were it not for the American Society, I would not receive any compensation for the public performance for profit of the individual numbers composed by my father.

My father was a very prolific composer. It would be almost impossible to set down here a complete list of his works. He wrote a great many operettas, light operas and musical comedies, the principal ones being:

M'lle Modiste
Naughty Marietta
The Century Girl
Old Dutch
The Cinderella Man
Prince Anamias
The Wizard of the Nile
Serenade
Idol's Eye
Cyrano de Bergerac
The Ameer
Singing Girl
Viceroy
Dolly Dollars
Babette
Tattooed Man
Wonderland
It Happened in Nordland
Song Birds
Camille
Prima Donna
Red Mill
Sweet Sixteen
Duchess
Only Girl
Princess Pat
Enchantress
Lady of the Slipper
Velvet Lady
Eileen
The Debutante
The Madcap Duchess
Madeleine
Natoma
Sweethearts
My Golden Girl
Girl in the Spotlight
Orange Blossoms
Dream Girl
Angel Face
Her Regiment
Oui Madame

[fol. 193] From time to time, various publishers acquired the publication rights to my father's works; the two principal firms that published his music were M. Whitmark & Sons and G. Schirmer, Inc.

In addition to the dramatico-musical works enumerated above, my father composed a great number of musical compositions, some of which achieved tremendous popularity.

There were waltzes, symphonic poems, suites, lieder and other pieces. I need mention only a few:

The Whiteman Suite	Badinage
Suite Romantique	Indian Summer
Suite Columbus	Pan Americana
Fleurette	Habanera
Souvenir	Yesterthoughts
Sunset	American Fantasie
Devotion	Valse a la Mode
Dream On (Indian Melody)	American Rose Waltz
	Christ is Risen
McKinley March	Air de Ballet
22nd Regiment March	Woodland Fancies
Irish Rhapsody	Punchinello
Al Fresco	Star Light Waltz
Heart Throbs	Forebodings
The Belle of Pittsburgh	

These compositions are played wherever music is sung or played in the United States, and famous popular songs from my father's dramatico-musical works, as well as other separate compositions have been played in the State of Washington for a great many years. They are part of the musical culture of that State, and wherever concerts are given, and whenever, during a great many years last past, an important hour has been broadcast over the radio in the State of Washington, my father's works have been included.

I have repeatedly tried to compile a complete list of my father's copyrights, that is to say, copyrights of his musical compositions, the majority of which were taken out by the [fol. 194] publishers, and I am afraid that I am unable to estimate the actual number of such copyrights. I have taken a few of his works, such as "The Red Mill", "Naughty Marietta", "M'lle Modiste" and "Babes in Toyland", and here is what I find:

On "The Red Mill", there are 46 copyrights and 11 arrangements. I have also taken out 28 renewals of copyright on the various numbers of "The Red Mill". Annexed hereto and made part hereof, is a list of the copyrights of the various numbers; arrangements and renewals, marked Schedule "I".

On "Naughty Marietta", there are 58 copyrights, and annexed hereto, made part hereof and marked Schedule "II", is a list of the respective copyrights covering that work.

On "M'lle Modiste", the publisher, M. Whitmark & Sons, has enumerated 53 original copyrights and 25 renewals, making a total of 78 copyrights, as appears by a list annexed hereto and made part hereof, marked Schedule "III".

On "The Red Mill", my records number 44 original copyrights and 28 renewals, or a total of 72 copyrights, as appears by a schedule hereto annexed, marked Schedule "IV".

On "Babes in Toyland", my records indicate 32 original copyrights and 31 renewals, or a total of 63 copyrights; all as appears by a list annexed hereto and marked Schedule "V".

However, my records and the records of the publishers, on the works above mentioned, do not seem to tally, and we have never been able to come to entire agreement with respect to all of the copyrighted works composed by my father. In some cases, the publishers seem to have copyrights for [fol. 195] works of which I have no record, and in other cases, I have copyrights of works of which they seem to have no record.

Each copyright has a history of its own, and to inquire into that history, make a complete record of it, would be an almost endless task. With all the information and facilities concerning my father's compositions, which have been at my disposal during nearly my entire lifetime, I could not attempt to make a complete and accurate list.

In "M'lle Modiste", there was a lengthy song entitled, "If I Were On the Stage". Mme. Fritzi Scheff appeared in the original version of the production. At the very end of that song, there was a finale number which proved to be tremendously popular. The audiences liked it so much that the publishers decided to bring it out as a separate number, and this was done, and this finale part of the song of "M'lle Modiste" was published as the song, "Kiss Me Again". To this day, it continues to be exceedingly popular. My publisher's list indicates ten separate copyrights on "Kiss Me Again", in addition to the number "If I Were on the Stage"; as appears by Schedule "III" hereto annexed, most of these are arrangements. With respect to each of

these, various licenses have been granted, uses made, rights conveyed, not only in the United States, but in Great Britain, Germany, France, Italy, Spain and other countries throughout the world.

I know that I could not possibly undertake to furnish a complete list of those who have had an interest in these versions from time to time, and I know that my publishers could not do it. It would involve going back over a great many years, searching records, studying correspondence, unearthing [fol. 196] contracts; just an impossible task. Even for me or my publishers to attempt it would entail an expenditure of more than $10,000.00, and certainly, more than $100,000.00, if this were to be done with respect to each and every one of the copyrights of my father's works, which number many hundreds of separate copyrights, each having a distinct history of its own, going back over many years.

As shown by the annexed schedules, there have been a great many renewals of copyright taken out either by me or by my brother and me. (My brother, Clifford V. Herbert, and I were the only children.) These renewals are of great value to me.

If I were required to issue individual licenses for the public performances for profit of my renewal rights, throughout the United States, it would involve engaging a corps of employees, a large corps of investigators and accountants, lawyers and experts who would be qualified to determine the value of a particular use of a particular composition in a particular establishment.

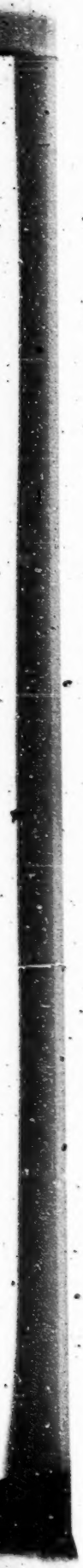
Considering that there are 30,000 establishments throughout the country, anyone of which might perform all or part of my father's works every night of the week, it would be a terrific burden for me to keep track of the performances and it would cost me a great deal more than $100,000.00 to attempt to license these works individually and separately throughout the United States. I cannot afford to spend any such sum. It is only by reason of my membership in the American Society of Composers, Authors and Publishers [fol. 197] that I am able to obtain compensation for the public performance for profit of my father's works.

The renewals of copyright taken out by me are, in my opinion, worth in excess of $100,000.00. My right to renew the copyrights of my father's works as the original copyrights expire, from time to time, is worth in excess of

$100,000.00. If the Washington Statute were to be enforced, the value of the aforementioned renewal rights to me would be totally destroyed.

Ella Herbert Bartlett.

Sworn to before me this 19th day of May, 1937. Marion L. Elkin, Notary Public, New York County. N. Y. Co. Clk. No. 103, Reg. No. 9 E 95. Bronx Co. Clk. No. 11, Reg. No. 48 E 39. Kings Co. Clk. No. 22 Reg. No. 9090. Commission expires March 30, 1939.



ACKNOWLEDGEMENTS FROM THE COPYRIGHT OFFICE OF THE RECEIPT OF TWO COPIES OF THE FOLLOWING COMPOSITIONS FROM "THE RED MILL"

1		DRAMATIC COMPOSITION	
		(BECAUSE YOU'RE YOU	
		(" " "	Arr. for Trombone Solo
		(" " " "	" Cornet Solo
7	(6)	(" " " "	" Mandolin Orch.
		(" " " "	" Guitar Solo
		(" " " "	" Hotel Orch.
8		ENTRANCE (GOVERNOR AND CHORUS)	
9		EVERY DAY IS LADIES DAY WITH ME	
10		GOOD-A-BYE JOHN	
11		GO WHILE THE GOIN' IS GOOD	
12		THE RED MILL FANTASIA	
13		FINALE 11	
15	(2)	(IF YOU LOVE BUT ME	
		(" " " " "	Arr. for Orchestra
16		I'LL RING THE BELL	
17		I'M ALWAYS DOING SOMETHING I DON'T WANT TO DO	
		(IN THE ISLE OF OUR DREAMS	
21	(4)	(" " " " " "	Arr. for Hotel Orch.
		(" " " " " "	" " Cornet Solo
		(" " " " " "	" " Trombone Solo
23	(2)	(THE LEGEND OF THE MILL	
		(" " " " "	Arr. for Hotel Orch.
25	(2)	(MIGNONETTE	
		("	Arr. for Hotel Orch.
26		MOONBEAMS	
27		OPENING CHORUS ACT 1	
29	(2)	(THE STREETS OF NEW YORK	
		(" " " " "	Arr. for Hotel Orch.
30		WHEN YOU'RE PRETTY THE WORLD IS FAIR	
32	(2)	(WHISTLE IT	
		(" "	Arr. for Hotel Orch.
33		A WIDOW HAS WAYS	
34		YOU NEVER CAN TELL ABOUT A WOMAN	
35		THE RED MILL VOCAL SCORE	
37	(2)	(LANCERS	
		("	
39	(2)	(MARCH AND TWO STEP	Arr. for Band
		(" " " " "	" Orchestra
40		SCHOTTISCHE	Arr. for Orchestra
43	(3)	(SELECTION	
		("	Arr. for Orchestra
		("	" " Band
46	(3)	(WALTZES	
		("	Arr. for Mandolin Orch.
		("	" " Orchestra

46 Copyrights

ARRANGEMENTS OF "MOONBEAMS" From "THE RED MILL"

		MIXED VOICES
		VOCAL ORCHESTRA
		MALE VOICES
11	Arrangements	DUET IN D
		FEMALE VOICES
		TWO PART SONG
		THREE PART SONG
		S.A.B.
		CELLO AND PIANO
		VIOLIN CELLO AND PIANO
		VIOLIN AND PIANO

RENEWAL CERTIFICATES COVERING THE FOLLOWING COMPOSITIONS FROM "THE RED MILL"

1		DRAMATIC COMPOSITION
2		BECAUSE YOU'RE YOU
3		ACT 1 OPENING CHORUS
4		" 2 " "
5		ENSEMBLE
6		ENTRANCE SONG AND CHORUS
7		EVERYDAY IS LADIES DAY WITH ME
8		GOOD A BYE JOHN
9		GO WHILE THE GOING IS GOOD
10		FINALE 1
11		" 2
12		IF YOU LOVE BUT ME
13		I'LL RING THE BELL
14	Renewals	IN THE ISLE OF OUR DREAMS
15		I'M ALWAYS DOING SOMETHING I DON'T WANT TO DO
16		LANCERS
17		THE LEGEND OF THE MILL
18		MIGNONETTE
19		MOONBEAMS
20		OVERTURE
21		SELECTION
22		THE STREETS OF NEW YORK
23		TEACH THEM WHAT TO SAY
24		WHISTLE IT
25		VOCAL SCORE
26		WHEN YOU'RE PRETTY AND THE WORLD IS FAIR
27		A WIDOW HAS WAYS
28		YOU NEVER CAN TELL ABOUT A WOMAN

11	Arrangements on Moonbeams
28	Renewals
46	Copyrights (originals)
85	Separate copyrights and renewals

CERTIFICATES OF PUBLICATION COVERING THE FOLLOWING NUMBERS FROM "NAUGHTY MARIETTA"

1		DRAMATIC COMPOSITION
		(AH SWEET MYSTERY OF LIFE
		(" " " " " Arr. for Violin, Cello & Piano
		(" " " " " " " Dance Orch.
		(" " " " " " " Piano
		(" " " " " " " Violin & Piano
		(" " " " " " " Duet In D
		(" " " " " " " " " B Flat
17	(16)	(" " " " " " " Three Part Song
		(" " " " " " " Mixed Voices
		(" " " " " " " Male Voices
		(" " " " " " " Two Part Song
		(" " " " " " " Male Voices
		(" " " " " " " Vocal Orch.
		(" " " " " " " Female Voices
		(" " " " " " " S.A.B.
		(" " " " " " " Cello & Piano
18		ALL I CRAVE IS MORE OF LIFE
19		BARN DANCE SCHOTTISCHE
20		DANCE OF THE MARIONETTES
		(THE DREAM MELODY
23	(3)	(THE DREAM MELODY Arr. for Orchestra
		(THE DREAM MELODY " " Band
24		IF I WERE ANYBODY ELSE BUT ME
		(I'M FALLING IN LOVE WITH SOMEONE
28	(4)	(" " " " " " Arr. for Mixed Voices
		(" " " " " " " " Hotel Orch.
		(" " " " " " " " Mandolin Orch.
		(ITALIAN STREET SONG
		(" " " " Arr. for Hotel Orch.
		(" " " " " " Duet in F
		(" " " " " " Soprano Solo
37	(9)	(" " " " " " Mixed Chorus
		(" " " " " " Three Pt. Song
		(" " " " " " S.A.B.
		(" " " " " " Two Pt. Song
		(" " " " " " Voc. Orch.
38		IT NEVER NEVER CAN BE LOVE
40	(2)	(IT'S PRETTY SOFT FOR SIMON
		(" " " " " " " Hotel Orch.
41		LANCERS
42		LIVE FOR TODAY
43		MISTER VOODOO
45	(2)	(NAUGHTY MARIETTA
		(" " " " Hotel Orch.
46		NEATH THE SOUTHERN MOON
47		NEW ORLEANS JEUNESSE
		(SELECTION
51	(4)	(" " " Mandolin Orch.
		(" " " Band
		(" " " Orchestra
52		THE SWEET BY AND BY
54	(2)	(TRAMP TRAMP TRAMP
		(" " " " " T.T.B.B.

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CERTIFICATES OF PUBLICATION COVERING THE FOLLOWING NUMBERS FROM "NAUGHTY MARIETTA"

56 (2) (WALTZES
(" Arr. for Orchestra
57 WE'VE HUNTED THE WOLF IN THE FOREST
58 YOU MARRY A MARIONETTE

58 Copyrights

M'LLE. MODISTE

Music - Victor Herbert
Book - Henry Blossom, Jr.

Partial List of Original Copyrights - in name of:
(M. Witmark & Sons, New York, as trustees for Victor Herbert
(and
(Henry Blossom, Jr.

1 Book — Copyrighted October 6, 1905 - Entry D 7367
2 Vocal Score — Copyrighted October 30, 1905 - Entry C 105903

Individual Numbers

"If I Were on the Stage" (Note: original title of "Kiss Me Again")

3 Song:- Copyrighted October 13, 1905 - Entry C 104750
4 Arrangement for Hotel Orchestra - Copyrighted November 3, 1905, Entry C 106471
5 Arrangement for Mandolin Orchestra by T. P. & Geo. J. Trinkaus Copyrighted December 21, 1906 - Entry C 137558

6 "In Dreams So Fair"

Song:- Copyrighted January 25, 1906 - Entry C 112826

"Kiss Me Again" (part of "If I were on the Stage")

7 Copyrighted: April 16, 1915 - Entry E 358936 - song
8 June 7, 1915 - Entry E 364261 - Vocal Orch. Arrg.
9 April 20, 1916 - Entry E 388379
10 Oct. 18, 1916 - Entry E 398837
11 April 12, 1918 - Entry E 424236 - Band Arrangement
12 May 10, 1918 - Entry E 427376 - Arrg. by Otto Lan
13 August 20, 1921- Entry E 533584
14 August 11, 1928- Entry E 699618 -
15 Dec. 7, 1931 - Entry E 523779)- Arrg. for violin
16 E 523781)- and piano

"I Want What I Want When I Want It"

17 Copyrighted:- October 4, 1905 - Entry C 104028
18 January 20, 1906- Entry C 112488
19 May 5, 1906 - Entry C 120630

"Chorus of Footmen"

20 Song Copyrighted October 13, 1905 - Entry C 104751
21 Piano Arrangement Copyrighted October 13, 1905 - Entry C 104752

"Dear Little Girl Who is Good"

22 Copyrighted September 29, 1905 - Entry C 103563

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23 Copyright September 29, 1905 - Entry C 103564

"I'm Always Misunderstood"

24 Copyright October 7, 1905 - Entry C 104282

"I Should Think You Could Guess"

25 Copyright October 7, 1905 - Entry C 104283

"Mascot of the Troop"

26 Song - Copyright October 7, 1905 - Entry C 104281
27 March - Copyright July 2, 1906 - Entry C 134697
28 Two Step for Piano - Arrg. by Karl L. Hoschner
Copyright January 20, 1906- Entry C 112489
29 Arrg. for Hotel Orchestra
Copyright October 27, 1905- Entry C 105784
30 March & Two Step Arrg. for Orchestra
Copyright February 21, 1906-Entry C 114739

"Keokuk Culture Club"

31 Song - Copyright October 16, 1905 - Entry C 105025

"The Time, The Place, and The Girl"

32 Song - Copyright October 12, 1905 - Entry C 104690
33 Arrg. for Hotel Orch.
Copyright November 3, 1905 - Entry C 106470
34 Arrg. by Trinkaus for Mandolin Orch.
Copyright February 9, 1906 - Entry C 113860

"The Nightingale and The Star"

35 Copyright October 14, 1905 - Entry C 104803

"When The Cat's Away the Mice Will Play"

36 Song - Copyright October 16, 1905 - Entry C 105026
37 Arrg. by George Trinkaus for Mandolin Orch.
Copyright December 20, 1924 - Entry C 606021

"Ze English Language"

38 Song - Copyright October 12, 1905 - Entry C 104691

"Love Me, Love My Dog"

39 Song - Copyright September 25, 1905-Entry C 103305

Opening Chorus - Act I

40 Copyright October 23, 1905 - Entry C 105504

Finale Act I

41 Copyright November 3, 1905 - Entry C 106468

Opening Chorus - Act II

42 Copyright October 20, 1905 - Entry C 105311

Entr Acte

43 Piano - Copyright December 29, 1905 - Entry C 105023
44 Arrg. for Orch. by H. L. Rogers - Copyright January 29, 1906 Entry C 113103

Ballet

45 Piano - Copyright October 16, 1905 - Entry C 105023

Selections

46 Piano Arrg. Copyright October 30, 1905 - Entry C 105902
47 Orch. arrg. by Otto Langey Copyright January 15, 1906 Entry C 112206

Miscellaneous

48 Fantasia Arrangement by Tom Clark for piano and trombone Copyright August 24, 1907 - Entry C 160407

49 ditto for piano and coronet Copyright August 24, 1907 - Entry C 160408

50 Waltz Arrangement for Orchestra by Otto Langey Copyright March 3, 1906 - Entry C 115495

51 ditto for piano by Karl J. Hoschner Copyright February 21, 1906, Entry C 114732

52 March and Two Step Arrangement for Orchestra by Otto Langey Copyright February 21, 1906 - Entry C 114738

53 Lancers Arrangement for Orchestra by Otto Langey Copyright January 29, 1906 - Entry C 113104

1 Book - Renewed in name of Marjorie Wilson, widow of author;
November 5, 1932 - Entry R 22194 (7367)

Following Renewed in name of Ella Herbert Bartlett, Clifford Herbert, and Marjorie Wilson:

Vocal Score

2 December 2, 1932 - Entry R 22367 (105903)

"If I Were on The Stage" ("Kiss Me Again")

3 Song December 2, 1932 - Entry R 22366 (104750)
4 Hotel Orch. Arrg. December 10, 1932 Entry R 22495 (106471)

"I Want What I Want When I Want It"

5 November 5, 1932 - Entry R 22026 (104028)

"Chorus of Footmen"

6 Song December 2, 1932 - Entry R 22368 (104751)
7 Piano Arrg. December 2, 1932 - Entry R 22369 (104752)

"Dear Little Girl Who is Good"

8 November 5, 1932 - Entry 22024 (103563)

"Hats Make the Woman"

9 November 5, 1932, - Entry R 22025 (103564)

"I'm Always Misunderstood"

10 November 5, 1932 - Entry R 22022 (104282)

"I Should Think that you Could Guess"

11 November 5, 1932 - Entry R 22023 (104283)

"Mascot of the Troop"

12 Song - November 5, 1932 - Entry R 22021 (104281)

"Keckuk Culture Club"

13 Song - December 2, 1932 - Entry R 22387 (105025)

"The Time, The Place and The Girl"

14 Song - December 2, 1932 - Entry R - 22363 (104690)
15 Hotel Orch. Arr. December 10, 1932 - Entry R 22494 (106470)

160

16 December 2, 1932 - Entry R 22375 (104803)

"When The Cat's Away"

17 December 2, 1932 - Entry R 22388 (105026)

"Ze English Language"

18 December 2, 1932 - Entry R 22364 (104691)

"Love Me Love My Dog"

19 October 5, 1932 - Entry R 21656 (103305)

Opening Chorus - Act I

20 December 2, 1932 - Entry R 22402 (105504)

Finale - Act I.

21 December 9, 1932, - Entry R 22493 (106468)

Opening Chorus - Act II.

22 December 2, 1932 - Entry R 22395 (105311)

Entr Act

23 Piano - January 3, 1933 - Entry R 33851 (111033)

Ballet

24 Piano - December 2, 1932 - Entry R 22386 (105023)

Selections

25 Piano - December 2, 1932 - Entry R 22413 (105902)

RED MILL

Original Copyrights issued to M. Witmark & Sons—as trustees for Victor Herbert & Henry Blossom, Jr.
Renewals issued to Ella H. Bartlett, Clifford Herbert and Marjorie Wilson.

		ORIGINAL		RENEWALS		
		Date	Entry No.	Date	Entry No.	
1	**Book**	Aug. 27, 1906	D-8998	Jan. 29, 1934	R-29233	1
2	**Vocal Score**	Sept. 27, 1906	C-130652	Jan. 6, 1934	R-28441	2
	Individual Numbers					
3	**Overture**—Piano Score	Sept. 24, 1906	C-130367	Jan. 6, 1934	R-28420	3
4	**Opening Chorus**—Act I	July 25, 1906	C-126164	Aug. 25, 1933	R-26740	4
5	**Entrance Song and Chorus**	Aug. 22, 1906	C-127973	Aug. 25, 1933	R-26766	5
6	**Finale I**	Aug. 6, 1906	C-126953	Aug. 25, 1933	R-26749	6
7	**Opening Chorus**—Act II	Aug. 6, 1906	C-126954	Aug. 25, 1933	R-26750	7
8	**Ensemble**	Aug. 10, 1906	C-127259	Aug. 25, 1933	R-26756	8
9	**Finale II**	Sept. 24, 1906	C-130368	Jan. 6, 1934	R-28425	9
10	**Because You're You**	Sept. 7, 1906	C-129045	Sept. 21, 1933	R-27086	10
11	**Every Day Is Ladies Day**	Sept. 7, 1906	C-129046	Sept. 21, 1933	R-27087	11
12	**Good-a-bye, John**	Sept. 24, 1906	C-130414	Jan. 6, 1934	R-28433	12
13	**Go While the Going is Good**	Aug. 22, 1906	C-127974	Aug. 25, 1933	R-26767	13
14	**If You Love But Me**	Mar. 30, 1907	C-147028	Apr. 3, 1934	R-30899	14
15	**I'll Ring the Bell**	Sept. 24, 1906	C-130415	Jan. 6, 1934	R-28434	15
16	**I'm Always Doing Something**	Aug. 22, 1906	C-127975	Aug. 25, 1933	R-26768	16
17	**In the Isle of Our Dreams**	Aug. 22, 1906	C-127977	Aug. 25, 1933	R-26770	17
18	**Legend of the Mill**	Aug. 6, 1906	C-126956	Aug. 25, 1933	R-26752	18
19	**Mignonette**	July 19, 1906	C-125813	Aug. 25, 1933	R-26734	19
20	**Moonbeams**	Oct. 6, 1906	C-131451	Jan. 6, 1934	R-28455	20
21	**Streets of New York**	Aug. 22, 1906	C-127976	Aug. 25, 1933	R-26769	21
22	**Teach Them What To Say**	Aug. 10, 1906	C-127258	Aug. 25, 1933	R-26755	22
23	**When You're Pretty and the World is Fair**	Jan. 24, 1907	C-140923	Jan. 29, 1934	R-29202	23
24	**Whistle It**	Aug. 6, 1906	C-126955	Aug. 25, 1933	R-26751	24
25	**A Widow Has Ways**	July 19, 1906	C-125812	Aug. 25, 1933	R-26733	25
26	**You Never Can Tell About A Woman**	July 19, 1906	C-125811	Aug. 25, 1933	R-26732	26
27	**Because You're You**—Arrg't for Guitar by T. P. & Geo. J. Trinkaus	Mar. 5, 1907	C-144656			
28	**In The Isle of Our Dreams**—Arrg't for Mandolin Orch. by Trinkaus	Feb. 2, 1907	C-142116			
29	**Selections**—Arrg'd for Military Band by Herbert L. Clarke	Mar. 4, 1907	C-144584			
30	**March and Two Step**—Arrg'd for Band by Herbert L. Clarke	Mar. 4, 1907	C-144585			
31	**March and Two Step**—Arranged for Orchestra by Otto Langey	Dec. 31, 1906	C-139003			
32	**Waltzes**—Arrg'd for Mandolin Orch. by Trinkaus	May 1, 1907	C-150181			
33	**Schottische**—Arrg'd for Orchestra by Otto Langey	Dec. 31, 1906	C-139002			

		ORIGINAL Date	ORIGINAL Entry No.	RENEWALS Date	RENEWALS Entry No.	
34	**Lancers**—Arrg'd by Otto Langey Orchestra Parts only	Oct. 29, 1906	C-133348			
35	**Because You're You**—Arrg'd for Mandolin Orch. by Trinkaus	Dec. 13, 1906	C-136836			
36	**Selections**—Arrg'd for Orchestra by Otto Langey	Nov. 17, 1906	C-134786			
37	**Waltzes**—Arrg'd for Orchestra by Otto Langey	Dec. 7, 1906	C-136302			
38	**If You Love But Me**—Arrg'd for Orchestra by W. C. O'Hare	June 4, 1907	C-153642			
39	**Fantasia**—Arrg. for Piano and Trombone by Tom Clark	Aug. 24, 1907	C-16404			
40	**Fantasia**—Arrg. for Piano and Cornet by Tom Clark	Aug. 24, 1907	C-16405			
41	**In the Isle of Our Dreams**—Song with Guitar Accom. arr. by Trinkaus	Mar. 8, 1907	C-146181			
42	**Selections**—Arrg. for Mandolin Orch. by Trinkaus		C-146606			
43	**Waltzes**—Arrg. for Military Band by Herbert L. Clarke	Apr. 3, 1907	C-147325			
44	**Lancers**—Arrg. for Piano by Karl L. Hoschna	Jan. 23, 1908	C-172634	Apr. 11, 1935	R-37148	27
	Selections—Arrg. by Karl L. Hoschna			1934	R-28472	28

44 Original Copyrights

28 Renewals

72 Copyrights Total

1938

BABES IN TOYLAND

Original Copyrights issued to M. Witmark & Sons—as trustees for Victor Herbert & Glen MacDonough.
Renewals issued to Ella H. Bartlett, Clifford Herbert and Alan MacDonough.

		— ORIGINAL —		— RENEWALS —		
		Date	Entry No.	Date	Entry No.	
1	**Book**	June 15, 1903	D-3587	June 26, 1930	9435	1
2	**Vocal Score**	Aug. 22, 1903	C-53514	Aug. 22, 1903	R-9900	2
	Individual Numbers					
3	**March of the Toys**—Piano Score	June 25, 1903	C-50193	July 25, 1930	R-9794	3
4	**Babes in Toyland Waltzes** Arrg't for Piano by Karl Hoschna	Aug. 11, 1903	C-52908	Sept. 3, 1930	R-9990	4
5	**Selections**—Piano Arrg't by K. Hoschna	Aug. 13, 1903	C-53048	Sept. 3, 1930	R-9991	5
6	**March and Two Step** Arr. for Piano by Hilding Anderson	Aug. 27, 1903	C-53819	Sept. 3, 1930	R-10028	6
7	**Toyland**	May 14, 1903	C-47877	July 25, 1930	R-9793	7
8	**Opening Act 3**—Chorus	Sept. 23, 1903	C-55185	Sept. 24, 1930	R-10300	8
9	**Opening Act 2**— "	Aug. 13, 1903	C-53068	Sept. 3, 1930	R-9992	9
10	**Barney O'Flynn**	July 1, 1903	C-50620	July 25, 1930	R-9790	10
11	**Beatrice Barefacts**	May 28, 1904	C-71675	June 3, 1931	R-14757	11
12	**Before and After**	May 11, 1903	C-47607	July 25, 1930	R-9792	12
13	**Birth of the Butterfly**—Finale Act I	Aug. 19, 1903	C-53345	Sept. 3, 1930	R-10023	13
14	**Country Dance**	Aug. 13, 1903	C-53067	Sept. 3, 1930	R-10021	14
15	**...ary Mary**	May 11, 1903	C-47608	Sept. 3, 1930	R-9989	15
16	**Floretta**	June 5, 1903	C-49100	July 25, 1930	R-9796	16
17	**Go to Sleep, Slumber Deep**	July 22, 1903	C-51815	July 22, 1930	R-9798	17
18	**Gavotte** (Eccentric Dance) Piano	Aug. 19, 1903	C-53344	Sept. 3, 1930	R-10024	18
19	**He Won't Be Happy Till He Gets It** (Words by Chas. N. Douglas)	Jan. 11, 1904	C-62674	Jan. 14, 1931	R-12327	19
20	**I Can't Do That Sum**	Oct. 31, 1903	C-57876	Nov. 1, 1930	R-11039	20
21	**In the Toymakers Workshop**	Oct. 7, 1903	C-56203	Nov. 19, 1930	R-11431	21
22	**Jane**	June 17, 1903	C-49789	July 25, 1930	R-9795	22
23	**John Johnson**	May 14, 1903	C-47876	Sept. 3, 1930	R-9988	23
24	**Legend**	Aug. 22, 1903	C-53511	Sept. 3, 1930	R-10027	24
25	**Mignonette**	Aug. 19, 1903	C-53342	Sept. 3, 1930	R-10022	25
26	**Military Ball**	July 1, 1903	C-50619	July 25, 1930	R-9791	26
27	**The Moon Will Help You Out**	July 8, 1903	C-51047	July 25, 1930	R-9799	27
28	**Never Mind Bo Peep**	Aug. 19, 1903	C-53343	Sept. 3, 1930	R-10025	28
29	**Our Castle in Spain**	Dec. 7, 1903	C-60317	Dec. 10, 1930	R-11786	29
30	**Song of the Poet**	Aug. 22, 1903	C-53509	Sept. 3, 1930	R-10026	30
31	**With Downcast Eye** Renewals	May 28, 1903	C-48664	July 25, 1930	R-9797	31
32	**I Can't Do That Sum**—Polka Two Step Arr. by Karl. Hoschna	June 11, 1904	C-72377			

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32 Original Copyrights

31 Renewals

63 Copyrights Total

[fol. 210] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER CONVENING THREE-JUDGE COURT—Filed June 9, 1937

It appearing to the Court that Complainants in the above entitled cause have filed a Bill of Complaint alleging that Chapter 218 of the 1937 Laws of the State of Washington, in certain respects, violates provisions of the Constitution of the United States, and

It further appearing that Complainants have moved the [fol. 211] Court for a preliminary injunction pendente lite restraining the defendants from action pursuant to said provisions of said Act, and

It further appearing that Complainants have moved the Court to convene three judges to hear such application for an interlocutory injunction, and the undersigned judge being duly advised, does hereby call to his assistance to hear and determine the application for an interlocutory injunction in this cause The Honorable Bert Emory Haney, United States Circuit Judge for the Ninth Circuit, San Francisco, California and The Honorable John C. Bowen, United States District Judge for the Western District of Washington, the date and place for the convening of the Court for such purpose being hereby fixed as June 29th, 1937 at 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard, in the court room of this court in the Federal Building, at Tacoma, Washington.

The Clerk is directed to forthwith mail a copy of this Order to Honorable Bert Emory Haney, United States Circuit Judge, San Francisco, California and Honorable John C. Bowen, United States District Judge, Seattle, Washington and is further directed to Mail copies hereof to Honorable Clarence D. Martin, Governor of the State of Washington and G. W. Hamilton, Attorney General of the State of Washington, at Olympia, Washington and to the attorneys for Complainants, and make return of such mailing.

It is Further Ordered that the Complainants forthwith deliver to the Honorable Clarence D. Martin, Governor of the State of Washington and each of the defendants a copy of this Order and if such has not already been done, a copy

of their Bill of Complaint and Motion for injunction with supporting affidavits filed herein.

It is Further Ordered that any affidavits in opposition to the granting of said Motion be by the defendants served and filed on or before June 25th, 1937, and that reply affidavits [fol. 212] upon complainants part, if any, be served on the defendant Attorney General and filed before noon on Monday, June 28th, 1937.

Signed at Tacoma, Washington, this 9th day of June, 1937.

Edward E. Cushman, Judge.

[fol. 213] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF E. CLAUDE MILLS—Filed June 29, 1937

Copy received June 28, 1937. G. W. Hamilton, Alfred Schweppe

E. Claude Mills, being first duly sworn, on oath deposes and says: That I am employed by the American Society of Composers, Authors and Publishers and have been in its employ for upwards of fifteen (15) years, most of the time in the capacity of General Manager. I have read the affida- [fol. 214] vits of Mike Lyons, Ervin E. King and Don Isham, verified June 24, 1937, June 23, 1937 and June 24, 1937, respectively.

Lyons operates a music hall in Seattle, Washington, and although he operates a cabaret with a floor show and employs an orchestra and singers, he has never taken a license from the Society to perform publicly for profit the music of its members. Although he operates the most lavish floor show in Seattle and performs all the current musical hits which have been duly copyrighted, he has not, since January 1936, I am informed and believe, obtained or taken out a single license, or attempted to secure a license from any owner of copyrights, or from any owner of the performing rights of copyrighted compositions. He is an habitual infringer, and although he has been notified by the Society within the past year not to perform publicly for profit any of the musical compositions copyrighted by the members of

the Society, he has ignored these notices and has persisted in the infringement of such copyrighted compositions. A suit was brought by the Society against him in this court on or about February 24, 1937, in which he has interposed an Answer denying infringement. As a matter of fact he denies that he has any knowledge as to whether or not he has infringed. That he could not make such a denial if he kept a record of such compositions performed by him. This shows that Lyons follows the usual practice of cabaret owners of keeping no records of performances of musical compositions in their establishments. Lyons is an habitual infringer and is following the usual infringer's practice,—namely to perform for their own profit all copyrighted musical compositions, regardless of who owns them, and without making any effort to obtain a license from any copyright owner.

Lyons complains that he is required to pay to the Society [fol. 215] for religious music not even controlled by it; I cannot conceive of Lyons playing any religious music in his cabaret. The performance of religious music for religious purposes is exempt from control of copyright owners, under the Copyright Act, and the Society has never attempted to collect from religious or charitable performances, and it has no right to do so.

Lyons states that he is unwilling to pay the Society for music not controlled by it. The truth is that Lyons wishes to pay nothing to any copyright owner for the music which he performs for his profit.

Lyons claims that if a list of compositions were filed by the Society he could pick out those which he wished to perform and pay for them. Lyons has a list of the members of the Society. On each and every copy of the sheet music of the compositions played by Lyons there is affixed at the foot of the first page the name of the copyright owner and the year the copyright was obtained. Lyons does not respect that notice. Does he wish this Court to believe that he would have any more respect for the rights of the copyright owners if a list of their compositions were filed with the Secretary of State? I annex hereto a copy of the musical composition, "I Will See You in My Dreams" which is one of the numbers upon which Lyons has been sued. The copyright notice appears plainly at the foot of the first page of the sheet music.

Ervin E. King, who says that he is the State Master of the Washington State Grange, and that he urged the passage of Chapter 218, Laws of 1937 (the State Statute involved), has never attempted to obtain any license from the Society, nor has the Society ever attempted to license his [fol. 216] establishment. The fact is that the Society has never licensed or attempted to license any Grange Organization, because it feels they are non-profit organizations which are doing more or less public service work and the Society has pursued a policy, with respect to Granges, not to treat them as infringers, and where Granges have requested licenses, the Society has cheerfully furnished such licenses without any fees whatever. King states that neither he, nor the Grange, nor anyone associated with him wants to use the Society's music for nothing. The fact is that King and his Grange have been using the music for nothing and the Society has never regarded them as infringers. King has no interest in this controversy. He is not affected by it. The only way in which I can conceive that King might be affected would be by the very State Statute which we now attack which would, under Section 2, make him an infringer, and subject to the penalties provided under Section 11 of the State Statute, something which the Society has never done to King or his Grange.

The State Statute even goes so far as to make anyone who participates in the performance an infringer. This would include the artists and musicians employed by the Grange. The Society has never in its history treated performers as infringers, and does not collect license fees from performers nor does it sue them for infringement.

Don Isham, who says he is the Musical Director of "KOL" in Seattle, makes a long affidavit, but does not indicate in the slightest wherein he obtains any knowledge or information with respect to the matters therein set forth. He complains of the "blanket license" but he does not state to this Court how he, as a musical director of the broad- [fol. 217] casting station would arrange his programs if he did not have such a "blanket license." Under the State Statute Isham would have to deal separately with each copyright owner. These owners, if they were not in combination would not be required to file lists. How would Isham deal with these owners? His station performs, con-

servatively, two hundred (200) musical numbers a day. Isham would have to contact the owners of these two hundred (200) compositions, each day, no matter where they were located (some are located in distant corners of the country, and the earth). He would have to negotiate with them and secure terms mutually satisfactory, and would have to obtain a formal license agreement in each case. Isham knows that he would never attempt to do this. What he would do undoubtedly is to do what Lyons is doing,—play each and every composition that he thought suitable, and take his chances on the owner not discovering the infringement, and if the owner did discover the infringement and brought suit, Isham would interpose an Answer and tire the owner out by means of protracted litigation. That was the method adopted during the early years of the Society and is the method which is still being practiced by a substantial number of users in the State of Washington and elsewhere. Users are well aware that copyright owners, located thousands of miles from the scene of the infringement are unable, if acting alone and individually, to finance litigation to protect themselves. I respectfully submit that the State Statute was enacted solely for the purpose of compelling the owners of copyrights to act as individuals, and so deprive them of the power to investigate and discover infringements, and to bring suits therefor, which they can now do through collective action.

I deny that the Society is dominated by a small group, or any group. Its monies, when collected, are divided equally [fol. 218] between the publishers on the one hand, and the authors and composers on the other, and are paid out on a classification system, under which the publishers, as a group classify their members, and the composers and authors, as a group classify their members. One group has nothing to do with the classification of the other.

I deny that I have any control whatever over the allocation of the monies, or that I have any control whatever over the personnel of the membership of the Society; as a matter of fact I am not a member of either of the classification committees.

Authors and composers, as well as publishers, are admitted to membership in the Society each year on the terms and conditions outlined in the "Articles of Association," without any discrimination.

Isham complains that the Society has not furnished him with a list of its copyrighted compositions. As a matter of fact, he has been furnished with a list of all the members of the Society, and he can tell at a glance from examining the sheet of music from which he performs whether or not that particular composition is copyrighted by a member of the Society. If it is so copyrighted Isham well knows that he has no right to perform the particular composition, without a license from the Society. Isham points out that the Society has a very large list of musical compositions. The Society has endeavored to compile a list of compositions both copyrighted and in the public domain. As to copyrighted compositions it has attempted to catalog both those of its own members and those of others. This is done by examining and cataloging the list of musical compositions furnished quarterly by the Copyright Office to anyone who [fol. 219] desires it and is available to the users of music, as well as to the Society, at a very nominal subscription rate.

The Society has also examined such works as Pazdirek which is a famous compilation of works in public domain, and has made a list of such works. This, likewise, can be obtained by users, as well as the Society.

The list required by the State Statute is limited to copyrighted music, as well as other copyrights. In addition to filing a list of such copyrights, the copyright owner would be compelled to state, under oath, that the list is a complete catalog of the titles of all compositions, whether musical, dramatic or any other classification; he would have to state the name and title of the copyrighted work, the date on which copyrighted, the name of the author, date of its assignment, if any, or the date of the assignment of any interest therein, the name of the publisher, the name of the present owner, together with the address and residence of all parties who have, at any time, had an interest in the copyrighted work. In addition to these facts the copyright owner must assign a price for each copyrighted work.

It must be borne in mind that the copyright owner is required not only to file a list of these works which he desires to license to users in the State of Washington, but of all works which he at any time copyrighted, whether he desires to license such works or not. In most cases the revenue that a copyright owner might hope to receive from the performance or other uses of a copyrighted composition would be

far less than the cost of attempting to comply with this Statute.

It is at once manifest that a staggering burden has been imposed by this State Statute upon the Society and its mem-
[fol. 220] bers and upon all owners of copyrights. To even attempt to obtain information with respect to all those who have had at any one time an interest in copyrights is a superhuman task. Frankly, I could not undertake to do it on behalf of the Society, and I do not believe that any copyright owner of a substantial number of copyrights could obtain a list with any degree of accuracy and put his name to it, under oath.

It is manifest that this impossible list is a requirement created in the certain knowledge that it cannot be humanly complied with. It was well known by the sponsors of this Statute that compliance with it was impossible. The Statute is so drawn as to make that purpose clear and selfevident. It was meant so to be. The object was to prevent compliance rather than to encourage compliance with the Statute.

Isham wants to make it appear that I have compiled a comprehensive list and that I could readily comply with the Statute. Nothing is farther from the truth. My list is a list of musical compositions as such, but it is not a list, nor does it include information as to those who may for twenty (20) or thirty (30) years have had some interest in these individual compositions. Compliance with the Statute does not concern itself with the numbers of copyrighted compositions, nor does it concern itself with the numbers of compositions owned by the so-called Warner group of publishers referred to in Isham's affidavit, nor to other publishers. It concerns itself with facts and information, which it is an impossibility to comply with.

It is manifest that the Statute imposes a terrific burden upon the authors and composers who have been prolific, and have written many compositions over the years, and
[fol. 221] that it likewise imposes a terrific burden upon publishers who are compelled, by reason of the nature of their business, to acquire information and deal in many thousands of copyrights which are known in the trade as their "catalogs". It is entirely lawful for a writer to make many compositions and have deals in them; it is entirely lawful for a publisher to have many thousands of copyrights; he must do so in order to exist.

All composers of a substantial number of compositions have, through the years, made a great number of assignments and licenses of their respective copyrights. All substantial publishers have likewise, during the course of their business career, made similar assignments and licenses and had their deals in copyrights. A typical example appears in the affidavit of Ella Herbert Bartlett, verified May 19, 1937, annexed to the moving papers filed herein.

Their separate agreements concerning the use of copyrighted work in motion pictures is dramatico-musical compositions, arrangements, medleys, recordings, transcriptions and other versions. All of the many thousands of licensees of the Society, since 1914 have from time to time had an interest in these respective copyrights, for the purpose of this Statute.

Moreover, the Statute is not confined to the interest in performing rights, but is so drawn as to include any interest whatsoever, and to require compliance with the Statute such a list would have to include all those other interests. Obviously, a tremendous, difficult and really impossible task.

As appears in the affidavit of Gene Buck, verified May 19, 1937, in the moving papers herein, radio broadcasters have never compensated writers and composers who are not members of an association for the public performance for profit, of their works. On the contrary, they have exacted [fol. 222] from such composers, as a condition for the performance of their works, gratuitous assignment of their performing rights and an additional right in other rights. Isham's solicitude with respect to those non-members of the Society does not square with past experiences, as disclosed in Mr. Buck's affidavit, nor does Isham mention a single case where he or any other broadcaster ever paid a non-member of the Society for the public performance for profit of his musical compositions, although over the years a great many of these compositions have been broadcast by Isham's station.

Isham's statement that he has no way of determining what proportion of the time on his station is taken by the music of the members of the Society is untrue. He knows what musical compositions belonging to the Society are played by his station. In fact he admits that he keeps a list of all musical compositions performed by his station. A check-up of the list, if accurately kept, would disclose instantly what music belonging to the Society is played and

what proportion is in the public domain, and if Isham has any trouble about making a computation it is due solely to the fact that his station, like a great many other broadcasters, does not keep a truthful and accurate list, for reasons best known to himself. Isham says that he receives many requests from non-members of the Society to play their music, but that his station cannot safely comply with the request, due to the uncertainty of the ownership of the performing rights. What uncertainty? The Society does not prevent Isham's station from playing the music of anyone else, and if Isham wants to deal honestly and fairly with a non-member of the Society, there is nothing to prevent him from playing such music of the non-member and compensating him for it. It would be very illuminating if Mr. [fol. 223] Isham would furnish a list of the non-members of the Society who have requested his station to play their music upon reasonable terms, and it would also be very illuminating to this Court if Mr. Isham would furnish this Court with all contracts his station has made with non-members for performance of their works. If such a list were furnished it would show that in each and every case Isham's station, where it performed a composition, paid absolutely no compensation whatever to a non-member, and I challenge Isham to produce on this Hearing a full, complete and accurate list of such non-members' works, and all of the contracts made with them for the past ten (10) years.

Isham distorts my statement made before the Committee on Patents of the House of Representatives (at Page 12 of his affidavit). My statement was taken out of its context. It referred solely to the requirement of registration of copyrighted works in the office of the Register of Copyrights in Washington, D. C., and I there stated that in the United States, as distinguished from foreign countries where no registration whatever is required, it was believed to be reasonable to compel the owner of a copyright to register his claim for copyright in Washington, D. C. The entire colloquy between Mr. Lanham, member of the House Committee on Patents and myself is as follows, (Page 190 of Hearings);

"Mr. Lanham: With reference to the Bern Convention, I recall that in our hearings heretofore there seemed to be a general desire upon the part of all who testified before the Committee for the United States to enter into the Bern

Convention, with this exception, that it was strenuously argued from the standpoint of the manufacturers' clause and from the standpoint of protection of American labor that we should not enter, because that was a formality prescribed in our law which would prevent adhering to the Bern Convention.

[fol. 224] At the time we had these former hearings the conditions in various European countries, of course, were very different from the conditions that exist today.

Mr. Mills: Certainly.

Mr. Lanham: I am wondering if the difference in viewpoint and attitude, for instance, expressed by you, and which I have heard expressed by some others, is due to the different situation in Europe now in the many countries than that which formerly existed.

Mr. Mills: Entirely due to that. The added requirement in the existing law, that works in which the creator desires a copyright must be registered, we have always regarded as a reasonable and safe requirement, though it places somewhat of a burden upon us.

If you wish to own real estate safely, you must record your deed. If you wish to own any property safely which you buy, you must get an authentic bill of sale, a receipt that shows that title to the property has been conveyed to you.

What is there unreasonable in requiring a person who desires to assert the ownership of a copyright—the exclusive, entire, and complete ownership of a copyright as against the whole world—to register the claim and file a copy of the work? That is particularly necessary, in my own opinion, because the property itself is intangible, and there should be a record of what it is."

This shows that the Society has no desire to prevent the public from learning the specific copyrights claimed by members of the Society. I still adhere to that opinion and the statements that I expressed before the Committee on Patents.

"Statements are quoted as to the amount of music which the Society claimed to have controlled at different times. These statements were made in answer to the insistence of users that they would not take out a license of the Society unless they were assured that the Society controlled a substantial part of copyrighted licenses and would issue a li-

cense for a very substantial repertoire. An example of [fol. 225] such demand on the part of users is the following editorial which appeared in the New York Hotel Review of February 17, 1917:

"Watch your step! You are being led into a wilderness! Have you given your best thought to the demands made upon you by the so-called American and French societies of composers?

"Already two 'societies' have sprung into existence. Their methods are akin to strangulation.

The Composers Hold Up!

I cannot believe that a fraternity of intelligent business men like the hotel men and the restaurateurs of this city and country are going to 'fall' for this most absurd and ridiculous hold-up ever perpetrated upon you, even if it has been legalized by a highest court decision.

"Surely you are not going to sign contracts with any combination of two or three Tom, Dick and Harrys who choose to call themselves a society of composers and then come around to bunk you into a contract! You have two 'societies' now. You may have one for each nationality within a few weeks. It looks so easy! You say 'graft!' Why graft isn't in it with this legalized hold up. Even a single composer can demand from you such a contract, and there are some millions of composers.

"Don't be a 'fall guy'! *Don't sign any contract, unless the one society does its part, and that is to get all composers into one society.*

"The Remedy! Have six orchestra leaders from six leading houses compile at once a list of all copyrighted music which you may render without this sabotage (many composers and publishers will be glad to have you play their music to advertis- it) and also of all music on which the copyright has run out. Distribute this, at whatever cost, broadcast. Abstain for one year from playing the graft-ridden copyrighted music or until the composers 'come down to earth' with a sensible proposition, and you'll save yourself endless trouble, litigation and a substantial sum of money besides.

"Go further! Take this matter before Congress. Present its vicious features and ask relief. The law never intended the results as they are today proving.

[fol. 226] "Just hesitate a moment—one American, French, German, Italian, Russian, Swedish, Jewish, Irish, Scotch, Turkish, Honolulu, Japanese 'Society of Composers,' all at about $15 per month each and a hundred more to come.

"If your organization is healthy and your advice right, you won't fall into the composers' trap. It's just plain but dangerous bunk!"

The American Hotel Association in an article published in the Los Angeles Pacific Coast Record, February 1936 states:

"The more groups there are acting independently and demanding license contracts, the greater will be the expense, confusion and annoyance in connection with procuring licenses to perform copyrighted music. It is a matter of convenience to music users to have one clearing house whose license will cover needed music. Such procedure is facilitated by the present similar policy of the larger broadcasters."

The following letter from the Oregon Food and Beverage Dispensers, Ind., is also significant:

"Oregon Food and Beverage Dispensers, Inc.

410 Henry Building Atwater 8499

Portland, Oregon

"December 18, 1934.

"Mr. R. J. Powers, American Society of Composers, Authors, Publishers, 1302 Yeon Building, Portland, Oregon.

"Dear Mr. Powers:

"Having read in the daily press of the litigation going on at present between the United States Government and the Attorney General against the American Society of Composers, Authors and Publishers, our organization wishes to go on record as endorsing thoroughly said Society.

"We have always recognized the rights of a composer under the Copyright Law and have recommended that those of our members using music secure this license at all times. [fol. 227] "It is readily understood that for each of our members using music to deal individually with each com-

poser, seeking permission to publicly perform each current song as it comes out, would involve a mass of accumulated correspondence by all parties concerned and would be almost impossible to work out in a practical manner. First of all, the proprietors of various places wishing this permission would not know how to get in touch with the proper composer or even know who the composer was in many cases.

"The Society which actually develops into a clearing house for the use of these various titles, simplifies matters wonderfully as the issuance of one license covers the blanket use of over 5 million copyrights. This is not only a great convenience but a tremendous service, a great time saver and a protection for the user of music from the possibility of dozens of individual suits being brought by individual composers as the user himself as a rule would be performing these songs unknowingly.

"We trust that the contemplated suit will be decided in favor of the Society if for no other reason than the facts as outlined above.

"We remain

"Very truly yours, (Sgd.) B. W. Cregan. Oregon Food and Beverage Dispensers, Inc., by Secretary."

In the hearings held before the Committee on Patents of the House of Representatives of the 68th Congress on House Bills 6250 and 9137 (p. 62), Mr. S. A. Handy, attorney for the Moving Picture Theatre Owners of America was asked:

"Would you prefer to deal with four or five hundred authors or composers or publishers than you would to deal with the one society?"

Mr. Handy replied:

"Why, certainly, I would rather deal with one society."

Isham, at page 13 of his affidavit, also refers to a statement which I made before the Committee on Patents of the [fol. 228] 68th Congress in 1934. That statement was to the effect that the owner of a copyright has an absolute right to determine the price to be paid for performance for profit of his copyrighted works. That right is inherent in all copyrights since both the Constitution and the Copyright Statute provide that the rights granted under the Copyright must be exclusive, and since they are exclusive as a

matter of law, the copyright owner has the absolute right to fix the terms upon which his works may be used and the price to be paid therefor.

Isham attaches to his affidavit, as Exhibit "A" a form used by the Society and furnished to broadcasters called "Record of Musical Program". Under the Society's contracts with Isham's station "KOL", and other broadcasters with whom it has licenses, these broadcasters are required to furnish the Society with a list of musical compositions copyrighted or composed by members of the Society broadcast by such station for a period not in excess of three (3) months in any one calendar year. That provision appears in Paragraph 6 of Exhibit "F" annexed to the complaint herein and reads as follows:

"6. Licensee agrees upon request to furnish to Society during the term of the within license a list of all musical compositions (or, at the option of Licensee, a list of all musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of Society or of which Society shall have the right to license the performing rights hereinbefore granted) broadcast from or through the said station, showing the title of each composition and the composer and/or author thereof; provided that Licensee shall not be obligated under this Article No. 6 to furnish such a list covering a period or periods in the aggregate during any one calendar year in excess of three months. The list so furnished by Licensee to Society shall be strictly confidential and Society covenants that it will make no disclosure thereof or of the contents thereof."

The form, Exhibit "A" was submitted for the conven- [fol. 229] ence of the broadcasters. Nowhere is there any indication on that form of the facts required under the State Statute. As a matter of fact in no case has such a record submitted by broadcasters been accurate.

The disadvantage which an individual copyright owner or composer would have in dealing with users is best illustrated by the fact that the owners of station "KOL" of which Mr. Isham is the Musical Director, also own stations "KGA" and "KHQ" in Spokane, Washington, and station "KGY" in Olympia, Washington.

It is obvious that with the ownership of four substantial broadcasting stations in the hands of a single individual,

composers, authors and publishers who are denied the right of collective bargaining would be completely helpless. Enforcement of the State Statute would bring about this result.

The so called intervening petition of KMO, Inc., annexes as Exhibit "B" a copy of an affidavit verified by Harold Weeks, filed in a proceeding in the District Court of Montana. The petition of KMO, Inc., is not verified, nor is the original affidavit of Harold Weeks submitted in this proceeding.

It is submitted that this is pure hearsay. However, this affidavit was necessary in the Montana proceeding.

In an affidavit of Gene Buck on April 28, 1937 he stated as follows:

"I have read the affidavit of Harold Weeks, verified April 12, 1937.

I deny that Weeks speaks for the rank and file of the writers of the Society, or that the Society has, at any time, been dominated by a small group, or that it has been unsatisfactory to both the user and the composer, and is in need or regulation, and I deny that all of the authors, composers and publishers are dissatisfied with the present system.

[fol. 230] Weeks is disgruntled. He attempts to give himself a certificate of character, indicating that he has written many "hits", and setting forth a list of his songs, which he calls "national hits". He has greatly exaggerated the celebrity of his songs. They are neither national nor "sectional hits".

As previously pointed out by me in another affidavit on this proceeding, the Society endeavors to obtain as accurate a survey as is possible of the radio performances of the compositions of its members, and it takes a survey from a substantial number of radio stations throughout the year. These stations reflect to a great extent the current popularity of compositions. For each performance of a work the composer of the song is given credit, the author credit, and the publisher credit. Below follows a table of the total credits to writers for performances during the years 1934, 1935 and 1936:

In 1934 we analyzed 37,629 radio programs, resulting in 3,999,494 credits to writers of which Harold Weeks received 285 or 7/10,000% (.0007).

In 1935 we distributed to writer members $1,610,562 in royalties, of which Weeks received $120. or 8/10,000%.

In 1935 we analyzed 33,461 radio programs, resulting in 3,953,406 credits to writers, of which Weeks received 78, or 4/10,000%.

In 1936 we distributed to writer members $1,905,427 in royalties, of which Weeks received $80, or 4/10,000%.

Weeks is receiving slightly more than he would be entitled to if he received remuneration on a per use basis calculated on the basis of the limited radio survey mentioned above. He is presently in Class 3 of the writers.

The Articles of Association and By-laws of the Society provide in Article XIV for protest and appeal from classification. Elaborate provision is made for such appeals, on pages 16 to 20 of the printed Articles of Association, which are annexed as Exhibit "D" to the complaint. Weeks has never availed himself of that right and has never taken an appeal from his classification. Moreover, Weeks became a member of the Society in 1922. He renewed his contract along with other members of the Society in 1925, and again in 1928, and again in 1935, each renewal covering a period of five years. Had Weeks been unfairly treated, he certainly would not have renewed his contracts.

[fol. 231] In 1934, prior to renewing his contract with the Society, Weeks suggested a revision of his Classification, as appears from the following letter:

"Forrest Hotel

49th Street West of Broadway

New York City

May 24th, 1934.

A. S. C. A. P., Classification Committee (Writers), Paramount Bldg., New York City.

GENTLEMEN:

Will you please review my record with the purpose of giving me something better than a "D" rating? I have been a loyal member in good standing for fourteen years and have a long list of published numbers to my credit. Outstanding among these are two of the biggest hits in the history of the business. I refer to 'Hindustan' pub-

lished by Forster and 'Chong' which broke the sales record for Feist. I have some other real hits to my credit. My phonograph royalties alone on two of my lesser numbers have for the past two years far exceeded what I have received from the Association. These two numbers are 'Little Cabin in the Cascade Mountains' and 'Red River Valley'.

"Recently I came to New York and am located here permanently for the sole purpose of writing songs. My first number since coming here, 'My Sweetheart', has just been released by Olman Music Corp. who have also accepted another song to be released next month. I have also placed a song which is now in work with Forster Music Publisher entitled, 'Wishing Moon'. I have several other songs under consideration by publisher members.

This is the first time I have ever asked for a better rating. Needless to say I will appreciate it if you feel justified in advancing me. The present rating doesn't mean much.

Sincerely yours, (Signed) Harold Weeks."

The Society replied to that letter as follows:

[fol. 232] "May 25th, 1934.

"Mr. Harold Weeks, Forrest Hotel, 49th Street & Broadway, New York, N. Y.

DEAR MR. WEEKS:

This is to acknowledge your communication of the 24th regarding your classification.

Please be advised that you are in Class 3 not Class D, as stated in your communication.

Your request for a higher rating will be presented to the Writers' Classification Committee at its next meeting.

Please be sure to send us either regular copies or orchestrations of your compositions as soon as they are published.

Sincerely yours, American Society of Composers, Authors and Publishers.

SR:AH."

At the next meeting of the Classification Committee, Weeks's application for a change of classification was duly

considered and was rejected, and he was so informed in the following letter:

"July 2nd, 1934.

"Mr. Harold Weeks, Forrest Hotel, 49th Street & Broadway, New York, N. Y.

DEAR MR. WEEKS:

Your request for a higher rating was carefully considered at the last meeting of the Writers' Classification Committee.

However, no change was made in your present classification.

With all good wishes to you,

Sincerely yours, American Society of Composers, Authors and Publishers, Writers' Classification Committee.

SR:AE."

[fol. 233] The fact that he took no appeal from the decision of the Writers' Classification Committee, and that he renewed his contract with the Society thereafter, shows that Weeks, himself, did not regard his complaint as a meritorious one.

The Writers' Classification Committee in 1934 was as follows:

Gene Buck, Otto Harbach, Deems Taylor, Jerome Kern, Sigmund Romberg, Oley Speaks, Raymond Hubbell, Irving Caesar, Fred Ahlert, Edgar Leslie, George W. Meyer, Joe Young.

Each of the members of this Committee is a man of prominence and prestige in the music profession, well and favorably known throughout the world, and of great experience therein, and fully acquainted with the works of authors and composers and their popularity value.

The defendants have not challenged the integrity of these individuals. Neither Mr. Mills nor any of the directors of the Society who are publishers of music are members of that Committee. They have no connection with the work of the Committee and do not participate in its work or classification and are not consulted by the Committee.

Weeks objects to the salaries paid to the administrative officers of the Society, who have tremendous responsibilities

and labors in looking after the affairs of this organization. That such salaries are not excessive is best evidence by the fact that the Society has been paying salaries to its officers for many years without any protest from any of its members."

I reiterate each and every statement quoted above made by Gene Buck.

E. Claude Mills.

Subscribed and sworn to before me this 28th day of June, 1937. G. F. Vanderveer, Notary Public in and for the State of Washington, Residing at Seattle. (Seal.)

[fol. 234] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF HEARING OF APPLICATION FOR INTERLOCUTORY OR TEMPORARY INJUNCTION—Filed June 21, 1937

To Honorable Clarence D. Martin, as Governor of the State of Washington; Honorable G. W. Hamilton, as Attorney General of the State of Washington, and to Each of the Defendants Named in the Above-entitled Action:

You, and each of you, are hereby notified that the complainants in the above-entitled cause did, on the 28th day of May, 1937, file in the above-entitled court at Tacoma, Wash-
[fols. 235-242] ington, a bill of complaint, supported by affidavit of Gene Buck, praying for a temporary and permanent injunction enjoining and restraining the defendants named in the above-entitled cause, and each of them, from bringing, directly or indirectly, any proceedings at law or in equity for the purpose of enforcing Chapter 218 of the Laws of 1937 of the State of Washington, relating to the use of copyrighted songs and music, against the complainants and others similarly situated, to which bill of complaint and affidavit on file in said cause reference is hereby made, and that the complainants then moved the Court for a temporary injunction and requested that the same be heard and deter-

mined by three Judges, as provided by Section 380, Title 28 of the United States Codes Annotated, as amended.

You and each of you are further notified that the Honorable Edward E. Cushman, one of the United States District Judges for the District of Washington, on June 9, 1937, made an order setting the complainants' application for a temporary injunction in said cause for hearing before the Court at the court room in the Federal Building in the City of Tacoma, Washington, on June 29, 1937, at 10:00 o'clock A. M., before three Judges, consisting of the Honorable Bert Emory Haney, United States Circuit Judge for the Ninth Circuit, San Francisco, California and The Honorable John C. Bowen, United States District Judge for the Western District of Washington, and The Honorable Edward E. Cushman, United States District Judge for the Western District of Washington, a copy of which order is hereto attached and made a part of this notice.

Dated this 10th day of June, 1937.

Vanderveer & Bassett, Attorneys for Complainants.
George F. Vanderveer, Samuel Bassett.

Received for Governor Martin by Richard Hamilton, Sec. to the Governor. June 12, 1937.

Sec. accepted June 12, '37. E. P. Donnelly, Asst. Atty. Genl.

[fol. 243] [File endorsement omitted]

Copy Received Jun. 22, 1937. Vanderveer & Bassett

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS ON BEHALF OF INTERVENING DEFENDANT, KMO, INC.—Filed June 29, 1937

Comes Now, KMO, Inc., Intervening Defendant, and subject to the ruling of this Court on its application to Intervene, moves this Court for an order dismissing the Bill of Complaint for the reasons and upon the grounds stated herein, and the Intervening Defendant recites facts herein

dehors the complaint to justify such dismissal, as are more particularly set forth hereinafter:

I

That there is a mis-joinder of parties Plaintiffs in that, each of said individual Plaintiffs are not only exempt from [fol. 244] the operation of this Statute (Sections 3 and 6) but the individual Plaintiffs, Carl Fischer, Inc., G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, as shown by Plaintiffs' Exhibits "A", "B", "C", and "D", attached to their complaint have heretofore executed certain valid assignments of their entire repertory of copyrights to the American Society of Composers, Authors and Publishers, not only by reason of their membership therein (See Article 3, Section 6, Plaintiffs' Exhibit "D") but by written instrument (see Plaintiffs' Exhibits "B" and "C" and Paragraph 18, P. 21, Plaintiffs' Complaint wherein Plaintiffs allege all members signed similar contracts) all of which divested these individual Plaintiffs of the entire control, proprietorship, and legal title to the use of their copyrights; that the Statute involved, as stated, expressly exempts Plaintiffs as individuals and their individual holdings from its operation (Sections 3 and 6 of Statute) and these individual Plaintiffs have no justiciable interest in this action; that said individual Plaintiffs being expressly exempt by law from the operation of this Statute have no interest in this controversy and will not lose any sum of money whatsoever, especially the sum of Three Thousand ($3,000) Dollars exclusive of interest and costs, and have therefore been misjoined; that said individual Plaintiffs expressly allege in Paragraphs 10 to 14 inclusive of their Complaint that their copyrights, which have now been assigned away to the Society or others, will be revested in them for the renewal period; that even this future interest and intangible value which said individual Plaintiffs assert belongs to them personally does not inject the jurisdictional sum of Three Thousand ($3,000) Dollars into this controversy for such an allegation must be considered in connection with Sections 3 and 6 of the Statute which expressly exempts Plaintiffs as individuals, now, as well as in the future; that the Complaint on its face demonstrates the lack of financial or legal interest on the part of said individual [fol. 245] Plaintiffs in this controversy.

II

That it clearly appears on the face of the Complaint that this case does not really and substantially involve a dispute, or controversy, properly within the jurisdiction of this Court in that, the amount or the value of the subject-matter in dispute as appears from an inspection of the complaint does not exceed the sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs; that from an inspection of the complaint; it is not truthfully alleged, nor does it even appear, that any of the named Plaintiffs, either the Society or the individual Plaintiffs will lose Three Thousand ($3,000) Dollars exclusive of interest and costs or any sum whatsoever because the individual Plaintiffs are expressly exempted by the Statute, and the Society being a non-profit body by its own admission cannot lose anything (see subsequent portion this paragraph) and the Plaintiffs cannot at this time aggregate any amounts to which they might be entitled to receive from the Society, as no loss has occurred and Paragraph 24 of the Complaint states all contracts are now being performed in addition, the Statute expressly prohibits (Section 2) any person from using Plaintiffs' music or any of Plaintiffs' property or any other copyrighted property without the consent of the owner thereof and this includes Common Law Rights or any Rights as the Copyright Act expressly protects the Common law Right and this Statute aids the entire Copyright Act; thus no damage can occur to Plaintiffs or to any person similarly situated whatsoever, nor can they be damaged in any sum by the provisions of this Statute, nor will they ever be deprived of any pecuniary sum or property in excess of Three Thousand ($3,000) Dollars; That Section 2 of this Statute acts as a restraining or injunctive provision in itself, in that, it provides a criminal penalty for its violation greater than any court order would likely provide; that in addition, this Court cannot assume any state court will unlawfully appoint [fol. 246] a receiver, or sell Plaintiffs' property, or damage Plaintiffs in any manner whatsoever without due process of law; that Plaintiffs' alleged damages for the purpose of showing the jurisdictional amount is based on misapprehension and fear; that since the individual Plaintiffs are expressly exempt from the operation of this Statute by Sections 3 and 6 thereof and cannot therefore establish any jurisdictional amount, this Court cannot indulge in the pre-

umption that if an application is made to a proper court for
ne appointment of a receiver for the Society, the sole and
emaining Plaintiff, who by its own admission (see sub-
equent portion this paragraph) is a non-profit body and
annot lose anything and whose members cannot at this time
ggregate any losses as there has not been any, that such a
ourt would unjustly appoint such a receiver, or would
rongly decide the constitutional questions presented upon
ich an application; that no filing fee is required by this
tatute (Section 4) and no other elements appear in the
mplaint or record which would justify this Court in as-
ming that the sum of Three Thousand ($3,000) Dollars is
volved in this action; that the Plaintiffs' allegation in
aragraph 1 of this Complaint, that they "continue" to
rotect the rights of its members, shows no harm is ex-
ected by Plaintiffs from this Statute and that the Society
self can suffer no damages; that the Plaintiffs' allegations
Paragraphs 10, 11, 12; 13 and 14, to the effect that the
renewals" are the personal rights of the individual Plain-
ffs, do not show a jurisdictional amount as such individual
ghts will be as exempt in 1951 from this Statute as they
e today under Sections 3 and 6 of the Statute; that Plain-
ffs' allegations in Paragraph 24 of the Complaint to the
fect that its contracts are now being performed shows no
mage has occurred or is likely to occur; that Plaintiffs'
legation in Paragraph 21 that it will cost each individual
omplainant $10,000 "a piece" is false as the Statute ex-
essly exempts the individual (Sections 3 and 6) and no
ing fee is required (Section 4); that Plaintiffs' allegation
[fol. 247] in Paragraph 25 of the Complaint to the effect
at it would cost the Society $50,000 to comply with the law
untrue as the Society is a non-profit body and Mr. E. C.
ills, the General Manager of the Society, testified in Mon-
na on April 23rd, 1937 that the Society's list of music
as already compiled and if such list is already compiled, as
s testimony shows, and no filing fee is required (Section
, no loss is sustained; that a true excerpt of the verbatim
port of Mr. Mills' testimony before the Three Judge Fed-
al Court hearing the case of Fischer et al. vs. Shannon on
e Montana Copyright Statute on April 23rd, 1937 in the
S. District Court of the District of Montana is quoted
reinafter; in that case the Society pleaded and alleged
der oath that they were a non-profit association; that the
laintiffs sedulously and deliberately fail to disclose that

fact in this case, and the Intervenor quote herein, makes a part hereof, of the Society's allegation in Paragraph 17 in its Complaint in that cause:

17. On February 13, 1914, a small group of composers, authors and publishers, under the leadership of Victor Herbert, Irving Berlin, Silvio Hein, William Jerome, Gustav Kerker, John Golden, Glenn McDonough, Ernest R. Ball, Raymond Hubbell, James Weldon Johnson, Louis A. Hirsch, Henry Blossom, George Maxwell, Jay Witmark, the complainant Gene Buck and the complainant publisher Irving Berlin, Inc., and others, organized a *voluntary unincorporated non-profit association under the laws of the State of New York*, which they designated as the American Society of Composers, Authors and Publishers (hereinafter referred to for brevity's sake as the "Society"); said Society was formed for the purpose of licensing to users of music throughout the country the right to publicly perform for profit the works of its members; said Society did not deal in any commodity, did not deal in any sheet music, exercised no function with respect to mechanical rights of reproduction, and was limited solely as aforesaid to the right of public performance for profit; *said Society has functioned continuously since said date;"*

That the testimony of Mills, General Manager of the Society, in said case shows that the loss, if any, is the members' loss and that the Society's list is already built:

[fol. 248] "Cross-examination.

"By Mr. Claxton:

"Q. *Mr. Mills, you mentioned a moment ago, I believe, that when money is collected by the society it goes into the general fund and remains there until it is ordered distributed by the board of directors, is that correct?*

A. *Yes.*

Q. *That money is held intact in the society until this resolution is passed by the board of directors?*

A. *Yes; sir.*

Q. *After the passage of that resolution, it is then distributed to its members?*

A. *Yes.*

Q. It is at all times the property of the members?

A. It is the property of the society until the resolution is adopted for distribution.

Q. Until the resolution is adopted. And that resolution is necessary in order to distribute it?

A. Yes.

Q. That resolution is made when the fund in the treasury of the association warrants it—is that right?

A. No. Customarily each quarter.

Q. Each quarter?

A. Yes. Every three months.

Mr. Frolich: Might I ask just one further question, if the court please?

The Court: Just a moment, first. Let us see whether counsel has finished his examination of the witness.

Mr. Claxton: That is all.

The Court: Very well. You may proceed, Mr. Frohlich.

Redirect examination.

By Mr. Frohlich:

Q. What would be the cost, *in your opinion*, of complying with the provisions of this Act with reference to the compilation of a list of the works of the members of the society and the members of the European societies?

Mr. Claxton: That is objected to, if Your Honors please, as incompetent, irrelevant, and immaterial, and as calling for the conclusion of the witness, and as not tending to prove or disprove any issues before this court.

The Court: The objection is overruled.

[fol. 249] Mr. Claxton: May I add, if the Court please, that the question does not call for any evidence? It is purely a conclusion of the witness. Any answer given would be based on speculation and surmise.

A. As a point of information for the court——

The Court: Just a moment, Mr. Mills. The objection is overruled.

Mr. Claxton: May we have an exception to the ruling of the court, if the court please?

The Court: Very well.

(The question was read to the witness.)

A. *Well, I * * * I cannot express an opinion. The cost would be completely a——*

Mr. Claxton: Just a moment. If he cannot give——

The Court: *Yes. If the witness cannot answer the question, he cannot. He says he cannot express an opinion. If he cannot do it, he cannot do it. That is all.*

A. (Concluded.) *No, I cannot tell.*

Q. What would you have to do to comply——

A. The statute, as I recall, requires to be filed with the Secretary of State of the State of Montana a complete list of all the copyrighted music dealers in respect to which any group claims the right to exercise the performing rights in the State of Montana, which list shall show the title of the composition, the name of the composer or author, the name of the publishing house, the year of the copyright, and the names and addresses of all persons who have at any time held an interest of any sort in the copyright. It would be completely and entirely impossible. *I personally supervise and have supervised the building up of the most complete index to the musical compositions that exists in this country.* I supervise a large staff of clerks who work under me constantly. I have had 20 years building these indexes and I know——

Mr. Claxton: *Just a moment please. We object to his answer now as not responsive to the question.*

Judge Haney: *No, I do not think it is myself.*

A. (Concluded.) *And it could not be done.*

Q. Well, would it cost $3,000?

A. It would cost more than $300,000.

Mr. Frohlich: That is all.

That there cannot be any loss to the Society as it will not have to pay the loss (Associated Press vs. KVOS 57, Sup. Ct. 197) and its individual members are exempt (Sections 3 and 6) and obviously the members cannot plead the losses of the Society in this case at this time as each member cannot [fol. 250] aggregate his losses or even know his losses at this time as the losses have not and may never occur (Eberhard vs. Northwestern Mutual Life Insurance Co., 241 Fed. 353), and the Complaint should be dismissed.

III

That said Bill of Complaint does not recite facts sufficient to entitle Plaintiffs to the relief prayed for and is without equity for not only does the Complaint fail to show the jurisdictional amount of Three Thousand ($3,000) Dollars is in dispute, but no substantial Federal Question appears; that no more than the Patent Statute was the Copyright Act intended to authorize agreements or practices in restraint of trade or tending to monopoly or price-fixing; that the Congress has never regulated copyrights and their use, and in the absence of such regulation by Congress, the State of Washington in the reasonable exercise of its police power and in order to prevent fraud and imposition upon its citizens may do so; especially is this true where the Statute involved only incidentally involves the subject of Copyright, as in this case; that the provisions of this Statute, section by section, are well within the dominion of the police power of the State of Washington; that such police power has never been surrendered to the Federal Government, nor directly restrained by the Constitution of the United States, nor suspended by any Act of Congress; that the Constitution of the State of Washington (Article XII, Sections 1, 5 and 22) was approved by the Congress and the general government of the State of Washington was thus enabled by the Congress long before the Copyright Law was passed in 1909; that the Statute involved in this case was passed by the legislature pursuant to a Washington Constitutional mandate (Article XII, Section 22) relating to price-fixing and is in aid of, as shown by the Title and Section 7, and not in conflict with the copyright laws of the United States; that Section 7 provides that:

[fol. 251] "That said business (use of music for profit) shall be subject to the police power and reasonable regulation of the State Government, *and such police and regulatory power shall be administered by the Courts and other officers of this State in a manner consistent with, in aid of, and never in conflict with, the Copyright Laws of the United States. The provisions of this Act, and the administration thereof, shall at all times effectuate the enforcement, the true intent, and the meaning of the United States* Copyright Laws * * *"

that such Constitutional provision, as aforesaid, was approved by Congress of the United States under the Washington Enabling Act and under the State Constitutional Law as determined by the Supreme Court of Washington, "price-fixing" is a question of fact and not of law, and questions involving State Constitutions are determinable only in the State Courts; that whether a crime has or will be committed by Plaintiffs is not a Federal question and the Plaintiff Society, the individual Plaintiffs being expressly exempt by Sections 3 and 6 of the Statute, can secure due process of law and the protection of its liberty and property in the State Courts under the provisions of this Statute; that the procedure in this Statute provides for a full and fair hearing and determination of all matters of fact and that, through judicial review, it provides for the protection of all the legal rights of the Plaintiffs, including any constitutional right which Plaintiffs may be entitled to invoke with respect to its claimed property rights; that the alleged contracts of Plaintiffs are not sacrosanct or immune from the Washington police power, or Washington Constitutional mandates, as long as due process is accorded and will be accorded as shown by the express admonition of Section 7 of this Statute to the Courts of this state, as quoted above; that no contract of any of Plaintiffs have been abrogated or even alleged to have been abrogated; on the contrary, Plaintiffs allege (Paragraph 24 of their Complaint) that they are being carried out; and since the subject matter of copyright is only incidentally drawn into question by this Statute and the State Courts have jurisdiction of a question as distin-
[fol. 252] guished from a case on the infringement of a Copyright, Plaintiffs' complaint does not come within any acknowledged head of Federal equitable jurisprudence or involve any Federal question and should therefore, be dismissed.

IV

That the preliminary injunction should be denied because no grounds exist therefor and the mere alleged misapprehension or fear of Plaintiffs do not constitute grounds therefor; that two elements must appear to give this Court jurisdiction, namely; (1) the jurisdictional amount and (2) a Federal Question; that both must appear, one element alone not being sufficient as they are indispensable to one an-

away, or adjudicate any rights arising under the Copyright Laws but confines itself to the prevention of violations of the State Constitution related to price-fixing and fraud in the use of said copyrights within this state; that there is a marked difference between a case involving copyrights and a question involving copyrights, the latter being determinable in the state courts while the former are determinable in the Federal Courts; that the question involved in this case is whether the State Legislature can prevent a copyright from being used by a "combination" or "pool" as an instrumentality of oppression or extortion within a state in violation of the State Constitution and State Laws, or as an excuse or a cloak for the creation of monopolies and price-fixing to the public disadvantage; that the Federal Constitution refers to "authors and inventors" and not to "combinations", "publishers", "pools", or "Societies", and the question involved in this case is not a Federal Question and is one determinable in the State Courts; that the use made of a copyright is distinct and separate from the right itself and the Supreme Court of the United States has adversely foreclosed Plaintiffs' contentions to the contrary and thus no Federal Question remains or appears in this cause; that an injunction should not be granted to restrain a state statute simply because the res or the object upon which the parties might have founded their criminal con- [fol. 253] duct has been patented or copyrighted; that an injunction will not lie in such a case because a malefactor could thus escape all punishment as the Federal Courts would have no jurisdiction to enforce the criminal statutes of a state; that this section of this Motion to Dismiss is supported by the records and files herein and by the facts recited herein dehors the complaint.

V

That the Plaintiffs have a plain, speedy and adequate remedy at law, and in the State Courts; that this Court has no jurisdiction under Section 384, Title 28, U. S. C. A., to award the relief prayed for, in that, the Federal Courts do not adjudicate upon the penal or criminal laws of a state where due process is expressly assured or expressly accorded by the Statute involved; that where the penalty of a statute, as involved in this case, is mainly that of an injunction, nevertheless, the Statute expresses a public right

the action is one exclusively determinable in the State Courts until Federal jurisdiction clearly appears or arises after some overt or actionable move has been made to enforce said law or engender such a question; that has not been done in this case as no injunction has been started; that equity courts do not issue their writs to assist in evasion of valid State laws, and especially will Federal Equity Courts not make their writs available to aid violators of State laws; that since the mere use of a Copyright is distinguished from the right itself and this statute, in the prevention of fraud, price-fixing and extortion within the State, merely regulates the use within the State and does not affect the right to any copyright no Federal Question appears, and the Plaintiffs have a plain, speedy, and adequate remedy at law; that no arrest has been made nor any property seized and no United States Constitutional provision has been violated and it clearly appears upon the face of the complaint and from — facts recited de hors the complaint that this court has no juris- — the person of defendants or the subject matter [fol. 254] of this action, and that the same is premature, based on assumption, misapprehension and unfounded fear, and should be dismissed.

VI

That it clearly appears upon the face of the complaint that several causes of action have been improperly united which cannot be joined in one action against defendants, jointly or otherwise.

VII

That this Court has no jurisdiction as a Court of Equity.

VIII

Intervenor, in order to conclusively demonstrate the lack of a Federal Question, and that the Plaintiffs are guilty of unclean hands and are not entitled to equitable relief in this case, affirmatively alleges pursuant to the appropriate procedure as expressed in A. P. vs. KVOS; 57 Sup. Crt. 197;

A

That the small coterie of publishers and writers controlling the Plaintiff Society have a sufficient number of copy-

cently infringe on their rights; they refuse to inform any person of the number or the titles of their compositions although Plaintiffs boast that they have some 3,000,000 numbers; that the copyright office has only received some 508,425 numbers for filing in the last 28 years, the life of a copyright; (see Exhibit "A" attached) that the Society has systematically and sedulously refused to disclose its holdings for the reason that the users of music, if they once knew the Society's holdings, could avoid using said numbers and avoid committing innocent infringements; that scheme used by the Society in obtaining and coercing blanket licenses is entirely unfair and uncalled for; the Society usually makes a request that a user of music take out a license from the Society to use all of the music in the world; if the user refuses, contending he will only pay the Society [fol. 255] for that music he actually uses and to which the Society can actually establish title and ownership, then the Society will lurk about the place and patiently wait for an infringement to take place; as aforesaid, it possesses just enough copyrights so that at sometime, from lack of knowledge, the user cannot help but innocently infringe; that the user does not know, by reason of the Society refusing to disclose its holdings, just what pieces they own or when the infringement takes place; armed, then, with two or three infringements obtained in this manner, the Federal Courts and the State Courts are innocently used as instrumentalities of extortion for a license is soon forthcoming from the hapless victim; that this Statute, demanding the filing of said lists by combinations and pools, exempting individuals, is a valid exercise of police power of a state to prevent fraud from being perpetrated on its citizens; that access to the Federal Courts is not denied, or to any court, however, an abuse of process is punishable, which is well within the State's province; that the certified copy of the affidavit of Harold Weeks, attached hereto and made a part hereof and called Exhibit "B", is particularly enlightening as to the Society's methods; that Weeks is the only writer member of the Society who resides in this state; that said Exhibit "B" was filed in the case of Fischer et al. v. Shannon, et al. in the United States District Court for the District of Montana; that this Statute will prevent fraud and imposition in the use of copyrighted property; that since Mills says he has a list already built (see his testimony Paragraph 3 herein) and the filing of such a list will not cost the Society

anything either in preparation or in filing fees (Section 4 of Statute), the user can then determine beforehand whether he wants to use or buy any of the Society's music the same as any other merchantable product; that if any user uses it without the Society's consent then such user will be guilty of a crime (See Section 2 of the Statute) as well as infringement, for this Statute is in aid of the Copyright Law (Section 7) but he will have had fair warning; now, the user has [fol. 256] no fair warning and the Washington Legislature by a vote of 90 to 1 in the House and 42 to 1 in the Senate overwhelmingly passed this Statute; that the wisdom or the lack of wisdom in such legislation is not a question for the Federal Courts but is one solely for the legislature;

That a per piece system is practical; that the user can now pay for what music he uses; that Intervenor now pays the Society an arbitrary fee of 5% of its gross revenue on all its programs whether such programs use any music at all; that the Society now takes 5% of the gross money Intervenor receives for news programs and all other programs not even using music; that many musical programs put out by Intervenor do not possibly use any of the Society's music, yet, Intervenor must pay the Society 5% of the gross receipts therefrom by reason of the coercive methods employed by the Society; that the Society, under this statute could easily arrange a system of licensing based on actual usage; that if they filed their list, Intervenor and other users could determine just what the Society actually owned and if Intervenor then wanted to use such music, Intervenor could pay for it at the price demanded by the Society for such, or leave it alone, as it willed; that a per piece system will naturally operate as a barrier to the arbitrary and coercive collection by the Society of 5% from Intervenor's news programs or other programs not even using music; that the estimated and speculated loss of revenue from such a doubtful practice and from such a coercive and arbitrary system of extortion is the money which the Society now alleges to constitute its jurisdictional amount in this controversy although Intervenor continues to pay Plaintiffs and will continue to pay the Plaintiffs until the validity of this law is established; that under the Statute, Intervenor would continue to pay Plaintiffs, as Intervenor cannot and does not want to use music for nothing;

[fol. 257] That Intervenor is in full accord with the Second Section of the said Statute, which provides a penalty for the

performance of music for profit without the owner's consent, and that neither Intervenor, nor anyone with whom Intervenor is associated or acquainted in the broadcasting industry desires to use the music of others without compensation at the prices to be fixed by the respective owners of the performing rights; that Intervenor is ready and willing to pay such owners for the use of their music each time it is used by it, but is not willing to pay for music not used by it, which is the case under a blanket license, nor pay the Society for music owned by someone else and not the Society or its members; nor is Intervenor willing to pay under a coercive license for blanket permission to use music when its supposed owners are unwilling and unable to specify and designate their true ownership as is now the case with the Society; that during the past five years, decent and honest efforts have been made by Intervenor and others to obtain a license from the Society providing for royalty payments based on the number of performances by Intervenor of the copyrighted musical compositions owned and controlled by the said Society and the members thereof, or of any other copyright owner, but the said Society and its members acting through it have refused to even consider royalty payments based upon the actual use made of their musical compositions; that many other proposals have been submitted to the Society looking toward a "per piece" plan but have been arbitrarily rejected by the Society; that Intervenor entered into the contract set forth by the said Bill of Complaint, as Exhibit "F" for the reason that Intervenor was forced and coerced by the Society into doing so and in order to continue in the broadcasting business by reason of the facts set forth herein; that under the present system Intervenor is absolutely at the mercy of the Society for it can, by a systematic campaign of filing infringement suits, in the event Intervenor's license was revoked or Intervenor refused to take out such a coercive contract, [fol. 258] wreck and ruin Intervenor's business; that the publishers of music in all cases require that authors and composers, as a prerequisite to the publication of their music, assign to the publishers what is known as the "small performing rights"; that as a result of the development of the radio the "small performing rights" became the most important, due to the fact that the performance of music

over the radio has become by far the most lucrative to the publisher; that what was known as the "grand performing rights" upon the stage became of very minor consequence; that the author gets little or nothing from the Society's operation as the performing rights are usually in the publisher; that the "small performing rights" so acquired by the publishers, as a prerequisite to the publication of the music, as aforesaid, has become by far the most important property and privilege available under the federal copyright system; that while the said Society is an organization of composers, authors and publishers, it is dominated and controlled by a small group of publishers and is operated mainly for their benefit and for their protection and for the enforcement of their own personal interests; that the membership of the society comprises approximately 100 publishers and approximately 780 authors and composers, but hundreds of authors and composers are not and cannot become members; (See affidavit of Harold Weeks member of A. S. C. A. P. Exhibit "B"); that the membership of the said Society is strictly controlled by Mr. E. C. Mills, who is neither a composer nor an author; that comparatively few authors and composers are admitted to membership; that only one member—Mr. Weeks—resides in the State of Washington; that the said Society, according to its own statements, includes approximately 90% of the leading publishers of copyrighted musical compositions in the United States, who control and own according to their statements, all of the copyrighted and acceptable and popular musical compositions published in the United States; that the "acceptable and popular" music is defined as that which appeals to the great mass of the people, as distinguished from standard, church, educational, and other musical compositions; [fol. 259] that practically all composers and authors of music, whether members of the Society or not, are compelled by the music publishers to assign to them the socalled "small performing rights", as aforesaid, and the said publishers have, as shown in the said Bill of Complaint, transferred all of the said rights to the Society; that the said Society constitutes a virtual monopoly of the said music world and unlawfully fixes prices for the use of the product thereof; that the said Society refuses to license the performing rights owned and controlled by it except through such

plaint, and refuses to furnish to the licensees, including Intervenor; any list or catalogue of the musical numbers; that in addition to refusing this information to the parties most interest, namely, those like the Intervenor who have paid for the right to use the said music of the Society, the said Society retains the right to issue what it calls a restricted list of music for which added compensation must be paid at so much "a piece" for each time played and mention made in the broadcast of the show or movie from which it is taken; and that this said restricted list is the only list of music furnished to licensees by the Society and since it places a price on each use or so much "per piece" in these many instances the provision in this Statute requiring a price on all of it at so much "per piece" is not unreasonable as it is in accord with the Society's own practice at this time; that Mr. E. C. Mills, the present Chairman of the Society, stated in a hearing before the Committee on Patents of the House of Representatives of the 74th Congress that the Society has an index of nearly 3,000,000 titles of musical compositions; that said testimony appears on page 190 of the published record of the said hearing; that it is now clear from his said statement then and before the Montana Three-Judge Court, that the Society must now have, or could readily prepare a list of its own copyrighted music without any loss, and it is incredible to believe that the Society would even attempt to operate or to enforce its rights without such a list; that this evidence shows conclu-[fol. 260] sively that Plaintiffs' allegations as to the jurisdictional amount and the cost of complying with this Statute is pure fiction; that it is disclosed by the certified statement of the Register of Copyrights annexed hereto as Exhibit "A", that only 508,425 copyrighted musical compositions exist in the United States; that since the Society now has a list of 3,000,000 the cost of complying with this Statute will be small indeed for the only copyrights of consequence to the music using industry are shown in said certificate of the Register of Copyrights in the column showing new published copyrights for the last twenty eight years (1909 to 1936 inclusive) and the renewals shown in the last column; that as hereinbefore stated, not all of those copyrights represent separate musical compositions, but that if they did, the total number, as shown by the said columns would be

public a list of its titles, the actual number thereof and the Society's inconsistent boasts in connection therewith, was indicated in 1935 by a petition filed by it in the Superior Court of the State of Washington for the County of Thurston in the case of State of Washington, ex rel, A. S. C. A. P. vs. D. F. Wright, Judge, Cause No. 26118; from that petition it appears that as a result of a disagreement, the Seven publishing houses controlled by Warner Brothers had withdrawn or attempted to withdraw from the Society and in that petition the Society stated, under oath, that the seven publishers owned 40% of the repertory of the Society and proceeded to allege as follows, although Mills' testimony before the Copyright Committee (supra) that the Society had 3,000,000 numbers already indexed, cannot be forgotten.

"Your petitioner further represents that at the time of the entry of said decree of injunction the following corporations, all of whom were members of this defendant association, owned the number of copyrighted musical selections set opposite their respective names:

[fol. 261] "Harms, Inc.	3,958
T. B. Harms Co.	373
Remick Music Corporation	4,509
M. Whitmark & Sons	11,101
Victoria Publishing Company	100
New World Music Publishing Company	71
Shubert Publishing Company	50
	20,162"

That from this statement of the Society, under oath, it is indicated by the Society itself that they, including the said seven publishers owned by Warner Brothers as aforesaid, are the owners of only 50,400 musical compositions in spite of its prior claim of 2,000,000 and 3,000,000 numbers; that to compel a filing of such a list of these numbers would "spoil" Plaintiffs' lucrative practice of extortion and Intervenor respectfully prays this Court not to consider such a questionable loss as part of the jurisdictional amount and to leave the wisdom or lack of wisdom of this Statute to the legislative bodies; that the said Society's methods are so

strict, burdensome, and onerous that it is practically impossible for a broadcasting station to use the music owned by others than the Society because the Society not only discourages this, but by its control and exaction of pay for the works of non-members it limits the production of music by killing the incentive of others to write (see Affidavit of Harold Weeks); that as Exhibit "F" discloses, the independent radio stations, such as that operated by Intervenor, are compelled to pay the Society not only a flat license charge but in addition, 5% of all its gross income from the sale to advertisers of operating time; that the Society now exacts tribute from the Intervenor for time sold or devoted to the broadcasting of lectures, dramatizations, sporting events, news programs, spot announcements, and from other programs whether or not the music of the Society, or any music at all, is used; the said Society arbitrarily and dictatorially demands that not over 15% for commissions to salesmen should be paid out, although the usual commissions paid are 30%; that discriminatory contracts have been made by [fol. 262] the Society, with certain newspaper-owned radio stations of large power and large potential audiences, at lower prices and with the national networks for the use of their music without charge; that by reason of said facts, the music of composers, authors and publishers not belonging to the Society are practically barred from performance over the radio and from the most lucrative feature of their copyright privileges; that through the said Society's contract, Intervenor and other users are compelled to pay for the use of the entire repertory of the said Society, regardless of the comparative worthlessness of the greater number of its compositions for their purposes; that only a comparatively small number are used to any considerable extent or can possibly be used in the broadcasting time available; that musical compositions are of various lengths but that on the average, if nothing but music were played, it would be possible to perform only about 200 numbers per day during a sixteen hour period of broadcasting, which, without repetition, would amount to 73,000 numbers in a full year of 365 days; that including as music the entire period of all programs and transcriptions in which no music at all is used, less than 70% of Intervenor's broadcasting time consists of music; that if the entire 70% of its broadcasting time were devoted exclusively to music, only some 30,000

numbers could be performed in a full year, or approximately one performance of each number owned by the Society, according to its own figures in its sworn statement in the suit as above stated; that Intervenor, however, believes the Society does not have the right to collect for more than one third of the numbers it now collects on through its fraudulent tactics, but due to the Society's refusal to furnish a list of its copyrighted compositions, Intervenor has no way of determining the correct proportion of the time used by the Society's music; that considerable parts of Intervenor's time is now used by public domain music, grand performing rights, such as broadcasting operas, and other music not even controlled by the Society; that it is a matter of common [fol. 263] sense and knowledge that many pieces are not even played at all but that others are repeated many times during their periods of popularity; under the present license the Society gets as much for a "poor" piece as it does for a "good" one; that it has been necessary on occasions for every radio station, for its own protection, to keep a list of the musical numbers performed by it for its protection against infringement suits; that the filing and preparation of a list is not any more burdensome than the recording by a station of its performances; that it is most feasible and in the interest of the users of music, as well as to the owners of performing rights, whether members of the Society or not, that payment be made therefor on a "per-piece" basis of licensing; in other words, payment should be made according to the number of performances made; that such a method of payment would allow the owner of each copyrighted piece of music, whether author, composer, or publisher, and whether a member or non-member of the Society, to receive just and decent compensation for his creation based on the merit and the popularity of his music and the use made of it, rather than through coercion as now practiced; that music is made popular by broadcasting and Intervenor receives great numbers of requests from authors, composers and publishers, many of whom are members of the Society, for the free performance of their numbers in order to popularize them, but that Intervenor cannot safely comply with their requests, due to the arbitrary claims of the Society; that by reason thereof Intervenor and the other radio stations cannot safely aid in the popularization of the music of non-members of the Society, even without

charge for the use of the offered music; that by reason of the combination, conspiracy and concerted action of the members of said Society, users are obliged to accept a blanket license as heretofore stated upon such arbitrary terms and conditions as may be whimsically imposed by said Society, regardless of whether their music is used or not; and the Society has secured the exclusive use of radio broad-
[fol. 264] casting and the other industries using music as a means of conveying their musical compositions to the ear of the public at large; by such tactics, they have restrained commerce and trade within this State, they have destroyed the incentive and opportunity of said users to use the musical compositions of composers, authors and publishers who are not members of said Society, and have prevented non-members from receiving just compensation for the rights of public performance to their musical compositions, which they would otherwise receive; that the Plaintiffs have thereby limited and restricted the popular demand of the listening public to musical compositions controlled only by said Society; and the Plaintiff members of said Society, through it, have been and are enabled to enforce, and have been and are now enforcing, acceptance of their arbitrary and non-competitive demands for royalties upon all classes of entertainers using music, for the reasons that such entertainers must perform those musical compositions controlled by the Society because the public, not having the opportunity to learn of the unknown compositions by reason of the exclusive and monopolistic tactics of the Society, demands only the known compositions; that the members of said Society, through it, have concertedly refused to grant such entertainers permission to perform individual musical compositions selected by the entertainers from a standpoint of merit in the composition, but have insisted and still insist that general licenses be accepted which cover all of the musical compositions of all the members of said Society, upon payment of a fixed amount thereof, irrespective of whether one or more of such musical compositions are actually performed or needed; in other words, the user must use all or none; that by this method of licensing, the members of the said Society have restricted the popular demand to just those musical compositions owned or controlled by them, and have thus prevented the use of musical compositions owned by non-members of said Society, includ-

ing composers who reside in the State of Washington; that [fol. 265] by reason of this concerted action of the members of the Society in refusing to issue licenses for the public performance of musical compositions owned or controlled by them, except upon the terms and conditions as above set forth, the Plaintiffs' members of said Society, as aforesaid, have prevented and are preventing the advertisement and popularization of, and therefore the sale of, musical scores owned by composers, authors and publishers residing in the State of Washington who are not members of the Society; that the Society has adopted and maintains a comprehensive system for the acquiring of detailed and complete information relative to the musical compositions used by broadcasting stations, by means of which information its members have been and are enabled to conduct their operations through said Society so as to prevent the development of competition between members thereof and owners of copyrighted musical compositions who are not members of the Society; that by these means, members of the Society have maintained and utilized the Society as an instrumentality of oppression, extortion, monopoly, and price-fixing within the State of Washington; that Intervenor has unwillingly and through compulsion been forced to accede to the illegal and unlawful monopoly of said Plaintiff Society and its Plaintiff members for the reason that each and every radio station must take any contract offered by the Society or be closed up by it; that the said E. C. Mills has stated publicly, as will be shown by the Affidavits, that he can close us up or charge us what he pleases; that the music users are compelled to submit to said Society's action in controlling and fixing prices and limiting free competition in the sale of the performing rights of all musical compositions, to the detriment of the citizens of the State of Washington, by such threats to close us up unless the users submit to their demands; that it is impossible for Intervenor to identify the particular compositions to which the Society claims ownership or control, for the reason that it refuses to furnish or file a list of its compositions and in effect has informed Intervenor and others that we must determine at our own peril just which compositions they do control; that [fol. 266] the notices given users of music to take a license from the Society or render no performance for profit of a

musical composition owned or controlled by them does not furnish the user with any aid in determining what compositions they purport to control as those notices simply set forth a formidable list of laws and decisions, together with a list of their members and affiliates and with an implied threat to take a license, or else retribution will be swift, sure and lasting; that on November 27, 1935, Warner Brothers, then and now members of the Society, stated when they resigned or attempted to resign therefrom:

"The Society at present is being run by a well-entrenched clique of executive officers who sign contracts and perform other important acts on their own authority, the board of directors in many cases having no opportunity to revise transactions until the society has been committed to them * * *"

"* * * These executive officers have very little at stake financially in comparison with the publishing firms that are threatened with extinction, although it must be said that the salaries paid the Society's executives are certainly not small, Mr. Mills, the General Manager, receiving about $50,000 a year for his services, and Mr. Buck, the president, about $35,000 * * *"

"* * * Furtherfore, the distribution to authors and composers of the various funds collected by the society is conducted in an illogical manner based mainly upon favoritism and politics. * * *"

"* * * The Society has not kept pace with the new uses of music, radio being the most glaring instance, Twenty years ago, when the Society was formed, radio was unknown. The astounding progress of broadcasting presented a problem to the Society which it has utterly failed to solve in the fair and reasonable interests of the creators and publishers of music."

"While it is true that most authors and composers have signed the Society's contract, they have done so without being given the benefit of an alternative or (in most cases) of a knowledge of the complete workings of the Society and the difficulties at present confronting it. One result of our resignation will be the opportunity opened for new writing talent, which has hitherto found it extremely difficult to obtain membership in the Society. The field will be open for unestablished authors and composers of real ability."

"The arrangements made by the Society have unduly favored the big radio chains over the independent stations."

[fol. 267] That if the owners of the performing rights who have associated themselves together in the Society will comply with the law and will file in the office of the Secretary of State their respective numbers together with the charges demanded by them for the use thereof in the same manner that they now charge for so much "a piece" on the restricted list, it will be easily possible for radio stations and other users to select the numbers desired by them and to pay therefor or leave it alone; that free and unrestrained competition will result among the owners of said copyrights and a fair and proper compensation for the use of each copyrighted composition will be obtained; that at the time of the said disagreement between the Society and the said Warner Brothers' seven publishing companies which had 40% of the Society's repertory, catalogues were issued by them showing the respective compositions owned or controlled by them; that the Society can easily provide one such list each year and bring it up to date yearly; that it would be easy to set forth after each number a basic price for its use, together with the variations of said price in accordance with the use to be made thereof, such price to be based upon the power and potential audience of the radio station using the same, and the possible audience and use by other establishments; that the Society does this now with its restricted list; that a compliance with the said requirement will, therefore, not be unduly burdensome nor constitute a taking of the copyright owners' rights without due process, as this Statute merely regulates the use; that the requirement of the Washington Statute in question, which compels the owner of a copyright, if a member of such a combination as the Society, to file a list of said copyrights is a reasonable and proper requirement; that Mr. Mills, the Manager or Chairman of the Society, testified to the reasonableness of such a requirement in a hearing before the Committee on Patents, House of Representatives, 74th Congress, 2nd Session, Page 190 of the published record, as follows:

[fol. 268] "The added requirement in the existing law, that works in which the creator desires a copyright must be reg-

requirement, though it places somewhat of a burden upon us. If you wish to own real estate safely, you must record your deed. If you wish to own any property safely which you do, you must get an authentic bill of sale, a receipt that shows that title to the property has been conveyed to you. What is there unreasonable in requiring a person who desires to assert the ownership of a copyright—the exclusive, entire and complete ownership of a copyright as against the whole world—to register the claim and file a copy of the work? That is particularly necessary in my own opinion, because the property itself is intangible, and there should be a record of what it is."

B

This Section of this Motion to Dismiss answers some of the contentions of Plaintiffs and further demonstrates the insufficiency of the Complaint; the Affidavit of Gene Buck, in this Cause, contains the following:

"The Society is an unincorporated non-profit association organized in 1914 for the purpose of protecting composers, authors and publishers of musical works against infringement of their copyrighted works, and to grant licenses for the public performance of such works for profit."

The Complainants can adequately interpose a defense to a criminal or injunctive proceeding brought under Section 10 of the Statute, and such a right of defense is an adequate remedy at law; that the criminal penalty imposed by the act is an ordinary one and not so oppres-ive that an adequate defense thereto is impossible; in addition, the defendants deny that they intend to enforce the criminal penalties of the act until the validity of the act has been finally adjudged; and the Complainants can interpose their defense in any injunction suit brought by a Prosecutor under Section 9 of the Act.

There is no allegation that Complainants have not complied, and cannot comply, with the Statute; their allegations go to the hardship, not the impossibility, of complying, and since Section 2 of the Statute is in itself a prohibition or [fol. 269] injunction in Plaintiffs' favor, and there is no allegation that Complainants' copyrights are now being illegally used in Washington, or that any public official will re-

should conclude that an adequate remedy at law exists; that the Complainants' objections to this Statute all go to the unconstitutionality of the Statute, apparently on the assumption that mere unconstitutionality in itself is sufficient, which it is not, to warrant injunctive relief and the Complaint should be dismissed;.

That the position taken by Complainants that the State of Washington has no police power with respect to the "exercise" and "use" of rights granted under the Copyright Act is already adversely foreclosed by United States Supreme Court decisions holding that, in the absence of Congressional action, the States have such police power in the premises; the Complainants contention that the Statute attempts to fix prices in other states and affects performances therein, in that it provides that a per piece system in Washington shall in no case be charged for on a basis in excess of any other per piece system in operation in other States where any group or persons affected by the act does business, even if it were tenable, cannot now be raised; that question can only be tried when a State of Facts arises requiring its decision, and since there is no allegation in the Bill of Complaint, that a per piece system is in operation in other States which would bring this clause presently into play, this Court of limited jurisdiction should not accept such a constitutional question for decision on moot points, or on an assumed set of facts; a State of Facts should presently be in issue to warrant decision on such a point; and the Act does not fix prices in other States. It permits complainants, or anyone within the regulated class, to fix prices in other States at whatever price they please, and then merely determines that the price in Washington shall not be one discriminating unfairly against the people of this State; and there is absolutely no basis for the contention [fol. 270] that the Washington Legislature made an "attempt to fix prices in other States"; that the Washington Legislature merely defined what an unfair price would be in this State; that point is still moot as no allegation is made that Plaintiffs are doing business in other States on a "per piece" basis or that the Washington authorities have presently attempted to "fix any prices" and the Statute does not provide for such, in any section, when and if some combination disobeys the law, and a receiver is appointed, the

Monopoly Board determines a fair rate as a procedural matter and only incidentally to the main action of injunction; that no allegation is made that Plaintiffs have or intend to disobey the law; and in the absence of such an allegation or State of Facts, this point is still moot;

That Complainants' contentions to the effect that the Act is invalid as it considers them "doing business" in such a manner as to bring them constructively within the bounds of Washington is untenable, as Section 8 of the Statute merely relates to the effect of process in the State Courts, and service of process is not a Federal Question; and this question is not presently before the Court; that if and when service of process is attempted in the manner indicated, that question can then arise, and not before;

The Complainants' contentions that the penalties of the Act are unconstitutional are too vague as the $500.00 fine or imprisonment provided for in Section 11 is obviously not an extraordinary one and does not warrant equitable relief, because the entire Act provides an adequate defense at law.

The Provision in Section 9, providing for a suit by a Prosecutor for an injunction and a receiver in the State Court, obviously does not give the Plaintiffs any ground for a claim of invalidity now; that question cannot arise until a Prosecutor invokes those remedies, and the Plaintiffs can make their defense at law in such a suit;

[fol. 271] The impugned Sections 9 and 10 carefully provide that a Defendant shall have the right to be heard in the State Court of Equity, where he can interpose all of his defenses subject to a review of the Supreme Court of the United States, before he can be deprived of any rights; hence, Complainants cannot try such questions now as their rights and defenses are adequately protected in the State Court before they can be deprived of anything.

Section 10 specifically provides that no right of any person shall be affected in the State Courts, "without full and complete process of law"; the Statute provides for a full and complete hearing and determination of all matters of fact and law, and through judicial review, it provides for the protection of all legal and constitutional rights of the Plaintiffs;

Plaintiffs' contention that the Statute denies the equal protection of the laws is untenable as the State has an un-

controlled right to say how far it will go in protecting anybody by its penal laws; and there can never be an impairment of the obligation of contracts if the Statute claimed to impair the contract is a valid exercise of the State's Police Power, because every existing contract is made subject to the reserved right of the State to exercise its police power even as against existing contracts; then too, none of Plaintiffs' contracts have been abrogated as shown by Plaintiffs' own allegations, (Paragraph 24 of Bill of Complaint);

Section 7 providing that the production, etc., of music is a business affected with a public interest is salutary, supportable by law, and there is no attempt made, or claimed, in the record or the Complaint that the State of Washington is now attempting any steps applicable to a "business affected with a public interest"; that if and when the State attempts to regulate rates, or exercise regulatory powers suitable to such business that question can then become judicially cognizable, and not before; that no Section of this [fol. 272] Statute attempts to restrict a copyright owner's access to the Federal Courts. They are as free to go there as before. The Act is "in aid of the Federal Copyright Laws" (See the Title and Section 7); to what extent a Federal Court sitting in a copyright case will recognize the State Statute, such Federal Courts will determine them, but such a question cannot arise in this cause;

That the saving clause (Section 12) preserves the principle of separability in the Statute and there are so many obviously valid provisions in the Statute, such as the requirement for public filing of copyrighted numbers and proof of ownership and prices, and which Sections are obviously separable, that the injunction should be denied and the suit dismissed for want of particularity; in other words, Plaintiffs fail and refuse to allege specifically just what clauses, lines, and sections of the Act are objectionable. As the Saving Clause (Section 12) preserves the valid Sections of the Act and establishes the principle of separability, the entire Statute is presumed to be valid and constitutional until the contrary clearly appears, or is specifically alleged, and since the constitutionality of any specific section, special line, specific clause or paragraph of the

Statute has not been specifically alleged or proved, the Complaint should be dismissed for want of sufficient particularity and equity.

In summary, the Complaint should be dismissed for:

1. There is a misjoinder, (see Section 1 herein).

2. The jurisdictional amount has not been established (See Sections 2 and 8 "B" herein).

3. There is no substantial Federal Question. (See Sections III, IV, and VIII "A").

4. No injunction should issue (See Section IV herein).

5. The Court has no jurisdiction as a Court of Equity as the Statute provides an adequate remedy at law. (See Sections V and VII herein).

6. That the interest of the Plaintiffs are separate, not joint and have been improperly united. (See Section VI herein).

[fol. 273] 7. Plaintiffs are not entitled to equity, being guilty of monopoly and price-fixing. (See Sections VIII "A" and "B" herein).

Respectfully submitted, Clarence C. Dill, Washington, D. C.; Kenneth C. Davis, Seattle, Washington; Leo Teats Tacoma, Washington, Attorneys and Counselors for K. M. O., Inc., Intervening Defendant.

Office and Post Office Address: 1514 Northern Life Tower, Seattle, Washington.

[fol. 274] EXHIBIT "A" TO MOTION

Copyright Office of the United States of America,
Washington, D. C.

I hereby certify that the following list shows the number of original and renewal registrations of copyright for musi-

cal compositions made from January 1, 1909 to December 31, 1936, inclusive, by years:

Copyright Registrations of Music List

Year	Published(1)	Unpublished	Total	Renewals
1909—Jan. 1–June 30	(2)	(2)	12561	.....
1909—July 1–Dec. 31	9449	237	9686	157
1910	25838	1366	27204	667
1911	29113	1465	30578	546
1912	25729	932	26661	656
1913	25894	1395	27289	586
1914	24720	1532	26252	624
1915	18684	2382	21066	686
1916	16315	3658	19973	877
1917	15612	5376	20988	920
1918	18438	6362	24800	1031
1919	19333	7959	27292	853
1920	22849	8765	31614	1005
1921	21459	7472	28931	1244
1922	20084	7104	27188	1443
1923	18133	7339	25472	1769
1924	18639	8270	26909	1658
1925	18407	7746	26153	2235
1926	15829	8816	24645	2483
1927	18425	8022	26447	3185
1928	18487	8895	27382	3100
1929	16778	12642	29420	3654
1930	17272	16148	33420	4236
1931	14311	16596	30907	3453
1932	12411	15992	28403	3827
1933	11196	14796	25992	3958
1934	11213	16640	27853	5047
1935	11490	18192	29682	4933
1936	12317	21587	33904	5849
Total	508425	237686	758672	60682

Notes:

(1) Includes an indeterminate number of published musical compositions also registered as unpublished under section 11 of the Copyright Act, as well as new arrangements of copyrighted works.

(2) Not recorded separately.

In Witness Whereof the seal of the Copyright Office has been affixed this tenth day of April, 1937.

C. L. Bowie, Register of Copyrights. (Seal.)

[fol. 275] EXHIBIT "B" TO MOTION

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

CARL FISCHER, INC., G. SCHIRMER, INC., IRVING BERLIN, INC., Gene Buck, Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett, Jane Sousa, Complainants,

against

RAY N. SHANNON, as State Treasurer of Montana, JOHN J. HOLMES, as State Auditor of Montana; Sam W. Mitchell, as Secretary of the State of Montana; Harold K. Anderson as Prosecuting Attorney of the County of Lewis and Clark of the State of Montana; John K. Claxton, as Prosecuting Attorney for Silver Bow County of the State of Montana; "John Doe" and "Richard Roe", Defendants

AFFIDAVIT OF HAROLD WEEKS, MEMBER OF AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

In Resistance to Application for Interlocutory Injunction

STATE OF WASHINGTON,
County of King, ss:

Harold Weeks, being first duly sworn on oath deposes and says: I am a member of the American Society of Composers, Authors and Publishers and I am sure that I speak for the rank and file of the writers of the Society; that almost from the inception of the American Society of Composers, Authors and Publishers, the Society has been dominated by a small group and it has been unsatisfactory to both the user and the Composer; this Montana Law is the necessary regulation needed; it will aid the composer and author and will not conflict with any of his rights under the Copyright Law; the Publishers really control A. S. C. A. P. and the Constitution of the United States does not say anything about "Publishers", it uses the word "Authors". I have known many writers in the Society who have tried to get their ratings raised who weren't in the small and immediate circle that control A. S. C. A. P. and they never get anywhere; when I was in the east in 1934,

I requested a raise in rating. At that time I had three new songs and all my other songs were being played and I was entitled to a new rating. I didn't get anywhere. I [fol. 276] went to see Mr. Mills, the Manager of A. S. C. A. P. personally after being turned down by the Committee who is handpicked and almost self-perpetuating; Mills sent word by his Secretary that he wouldn't even see me, although personally, I knew him well. He has been a Czar running the affairs of the Society to suit himself and a small coterie of band leaders who do not contribute anything to the musical world. All of the authors, composers and even the publishers are dissatisfied with the present system and feel that since Congress has made no regulation of the Copyright field that such lack of regulation indicates a State should do it.

The greatest injustice of the present system of blanket licensing now indulged in by the Society is not so much to the writers that are now in the Society but to the writers who have been unable to get in who have had successful numbers. The Society has collected for the playing of their numbers and then do not give them any part of it. They just do not and will not grant them membership. To such writers, who are without the Society, this injustice and this sort of treatment kills their incentive for song writing. Any writer who writes a song that is used for profit is entitled to something. It is so in any other lines of endeavor. These writers who have been denied admission to the Society are thereby denied what is justly coming to them for the Society collects on their songs which they do not control. They are the ones who have been most unjustly treated. Then too, this dissatisfaction among the membership is not limited to just the authors; there are many publishers who have been outside of the ring that feel the same way about it as I do.

What incentive is there for new Montana Writers? They cannot get any money unless they join the Society and the Society will not let them in. However, a writer shouldn't have to join the Society to get what is coming to him. If a "per piece" system is put in effect the writer out of the Society will get his just deserts. Members of the Society [fol. 277] like Rudy Vallee and Ben Bernie are not song writers; they are band-leaders who control "what pieces" will be played, and they actually sway and shape the taste

of the American People; that is too much power to put in their hands; a per piece system will supplant merit for influence.

Today, the sale of copies of sheet music has shrunk to where it doesn't mean a thing. After writing a "hit" today, it means you will probably sell 25,000 copies for which, say 3¢ is received, and this is divided in six different ways. The author doesn't get anything out of it. There are too many "cuts". As far as royalties on sheet music, piano rolls, and records are concerned, and after being denied their share of performing rights which they are denied because these royalties are divided so many ways, there is no incentive to write. Where can they make anything out of it? A. S. C. A. P. is out of tune, so to speak. A. S. C. A. P. needs regulation by a State; it will make A. S. C. A. P. stronger for it although its control will then rest on merit and not internal politics as at present. In the old days it was possible to write one hit and make a fortune. Wallace and I divided $65,000.00 from the royalties which were paid to us from Forester, the Chicago publishers, on one "hit". These royalties were just based on music sheets, piano rolls, and records. This amount of money from performing rights is now being divided among a certain clique, not the authors; the per piece system will insure the authors in getting their money; A. S. C. A. P. has also been unjust and unnecessarily rough to the users of our music; A. S. C. A. P. is always in trouble; you simply cannot sell a merchantable commodity like music with a club in one hand, so to speak; this law of Montana prevents anyone from using our music without consent or without paying us for it. What is wrong in that? Then too, I am willing that the playing of my music should depend on popular demand. A per piece system will do that.

[fol. 278] A. S. C. A. P. arbitrarily sets the rates to the users. There is a better way—the "per piece" plan. A. S. C. A. P. also sets an arbitrary classification to its members, and they arbitrarily set the ratings of certain publishers and writers. They have no adequate system of finding out what they are entitled to, so they arbitrarily, in my opinion, set the rates and they favor those that they want to and disfavor those whom they wish; the amount paid into the Society is not based upon the merit of the composition.

The performers like Bernie and Vallee who are members

of the Society are not in fact writers and they have never written anything of consequence; certainly they should not have writer membership in the Society merely because their names have been put on a title page. It is just another way of the Society's hurting the writers and authors instead of helping them, and these performers really control the publishing business by their "plugging" or refusing to "plug" the songs of the publishers; they have the publishers over the barrel, so to speak.

The Society not only favors those they want to, but thrust other writers in who are not really composers. They set up writers for membership who Mills wants to make a part of his machine and give them the best of it.

The present system of licensing users is inherently wrong because they do not pay the composer on the basis of merit on the songs he writes or on the popularity of those songs and the number of times the songs are used. I have written over forty songs of which ten were national hits and sixteen sectional hits: here is a list of my songs and publishers:

Title	Publishers	
Hindustan	Forster	National Hit
Chong	Feist	"
Siren of a Southern Sea	Forster	"
Cairo	Sherman & Clay	"
Kentucky Home	Remick	"
Fuzzy Wuzzy Bird	Forster	"
Montana	Forster	"
By the Side of the Road	Weeks & Wnye	"
[fol. 279]		
Little Cabin in the Cascade Mountain	West Coast	"
Red River Valley	West Coast	"
Melancholy Moon	Remick	Sectional Hit
Can't you Love Me	Sherman & Clay	"
Dear Old Home	Sherman & Clay	"
Amiti Ya (Persian Love Song)	Feist	"
Beautiful Summer Night	Forster	"
By Baby Bunting	Forster	"
Honey Bee	Haviland	"
Loves Canoe	Forster	"
Mew Mew Rag	Fred Snyder Co	"
Don't Be Angry	Abe Olman	"
My Sweetheart	Olman	"
Ione	Gillick	"
My Honolulu Bride	Remick	"
My Blue and Gold Girl	Natl' Frat. Pub. Co.	"
Waltz With Me	Gillick	"
Mississippi Steamboat	Forster	"
What's a Fellow Goin' to Do	Remick	"
Sweet Memories	Forster	"
Tropical Moonlight	Remick	"
My Candy Girl in Old Ceylon	Gillick	"
Under Western Skies	Echo	"
Little Joe	Echo	"
You Ought to Know	Echo	"
Sandy	Echo	"

Title	Publishers	Sectional Hit
Come Along Ma Honey	Echo	"
Everybody's Crazy 'Bout Dawn	Echo	"
Tiny	Echo	"
Haidee	Echo	"
Waltzing in Your Arms	Echo	"
The Owl and the Moon	Melody Shop	"
Seattle Town	" "	"
Evangeline	" "	"
With All My Heart	" "	"
Sing Bonnie Sweet Bessie	" "	"
Oriole	" "	"
Beware the Military	" "	"
We'll Wander Over Yonder	" "	"
In the Garden of Other Days	" "	"
Papeetee Sweetie	" "	"
The Brook	Weeks & Wayne	"
Night Time, Love and You	" "	"
Ada	West Coast	"
My Valse Viennese	" "	"
Sleepy Bye	Weeks & Wayne	"
Moonlight Makes me think of you	West Coast	"
Come on Washington	" "	"
Don't Stand Out in the Rain	" "	"
Come Sunrise	" "	"
Neath the Palms	" "	"
My Villa	" "	"
When Evening Comes	Stevenson & Weeks	"
Seven Miles to Arden	" " "	"
Beautiful Northwest Country	West Coast	"
That's My Boy	Weeks & Wnye	"
The Song Bird	" "	"
Estrellita	West Coast	"
Along a Moonlit Way	Weeks & Wnye	"
The Spider Web	" "	"
Saying Goodnight	" "	"
[fol. 280]		
Sumatra	Weeks & Wnye	"
Isle of Dreams	West Coast	"
Wishing	" "	"
Trianaa	" "	"
My Crystal Set	Brunswick	"

I received a little better than $80.00 last year while Mr. Mills, who never wrote a song, receives $50,000.00 a year and others in the clique receive just as enormous salaries. These salaries plus other expenses such as the amounts given to individuals who are not real writers eat up the monies received and the "author", whom the Constitution refers to, and does not refer to "Publishers" or "performers", get very little of the money; as I see it, there are only two ways of handling the situation. One is the "flat" or "price-fixing rate" in vogue as at present which is unjust to the "author" and the "user" and the other is the "*per piece plan*", which in my estimation, is the only fair way of handling this matter. This "per piece plan" will dispense with the arbitrary way of handling rates, fixing fees, and will end the abuses which are now employed. A. S.

C. A. P. could establish an office to act as a clearing house and then act as a collection bureau. Now A. S. C. A. P. even owns copyrights and is not just a clearing house. In fact, a great many of the publishing houses are controlled by A. S. C. A. P. so it is not a truly representative Society representing the "Authors" whom the Constitution refers to. As I see it, the broadcasters and other users of the copyrighted numbers will be required under this Statute, if they want to use the music, to furnish a report for every day, covering all of the musical numbers that they use. These could be forwarded to the main office of the Society—If the Society acts in good faith as a clearing house—and the numbers that are in the public domain should be stricken off of the list, and the balance of the money received for the use of protected numbers listed with the Secretary of State of Montana should be allocated to the different writers, after deducting a legitimate expense for handling them. That is why I say that this Montana Statute is a step in the [fol. 281] right direction. Congress does not regulate our copyrights. We simply file them there. There is no determination there as to its originality or as to its validity as in the case of a Patent in the Patent Office. I believe Congress has indicated by its refusal to Regulate Copyrights that the State could do it.

As I said, I have been a member of A. S. C. A. P., since 1922 and I only received about $80.00 last year for forty songs. The song "The Music Goes Round and Round" hasn't sold 50,000 copies, and it was one of the big successes of the year. If a per-piece plan were being used they (the composers) would have a fortune. A "per piece plan" is the only fair way of doing it. It eradicates the abuses. Why should a man receive as much for a poor song as a composer does for a good one? That is the present system. Then too, I reiterate that a man shouldn't have to join the Society to get what is coming to him. The Society should act merely as a clearing house. In other words, A. S. C. A. P. if it wants to exist, should be a collection agency and a clearing house instead of controlling and actually vending the music. I believe, on information, that a great many of the present member publishing houses are actually owned by A. S. C. A. P. I know where A. S. C. A. P. actually filed, but withdraw an assignment to all the works of one Publishing House. The Society owns outright

those numbers in that Publishing House. I would like to see the author get some money instead of it all going to the Society. The fellows who composed the songs are now getting practically nothing for them.

There are two courses open, as aforesaid, a "flat rate" as at present, which is price-fixing or a "per piece" plan which is the only fair way. Each writer would then get what he should get, which was the original purpose of the Society. I feel sorry for the young authors who are unable to get their performing rights because they are unable to get into the Society. But, if this Montana regulation is carried out, then a song will only be worth "what it sounds [fol. 282] like" and that is as it should be and personal influence will have nothing to do with its sale; if the user wants a song under the "per piece" plan he can select it from the list in the Secretary of State's office and pay the price demanded or leave it alone. This list which should be filed with the Secretary of State will not be onerous or burdensome. The Society hasn't as many copyrights as it claims. That is why they will not publish a list because the "users" could actually avoid using their music, if necessary, if the users knew what songs the Society had. I will file a list and will be glad to set a price opposite my numbers. Then the public can buy what they want or leave it alone, as they will.

In conclusion, this Montana Statute will do what has been needed to be done for years. At the present time, it is impossible for any user of music to tell whether or not they are infringing the copyrights of the Society; that is distasteful to me. I believe music is so important to the world that we composers could obtain redress from the Courts without stooping to such tactics. In any event, I would like to see that ideal tried out fairly for once. A user should be able to determine whether he is using your music or not; this is especially true where a group have jointly pooled their rights. The practice of lurking about waiting for infringements is not in keeping with the dignity of a composer. Before the law was well settled on the rights of a composer, there might have been some justification for such tactics, but that day has passed. Now, if a group of ranchers want to give a dance out in the country, they have no way of telling whether they will infringe on our rights. We composers are just as good people as they are and since

the Statute will make them pay for the music and get our consent, I believe the composers and authors (not speaking for the publishers) should meet them half-way and let them know what property rights we claim to own and the price we want for it; that the only fair and just basis for future [fol. 283] dealing is the "per piece" plan, and that is why the copyright owner, especially where the authors are willing, should be required to furnish a catalog or list of the copyrights which he or she owns or controls, and a charge should then be stated, and later charges could be arrived at by negotiations between the copyright owner and the users, fixing a price to be paid for each performance of any of the copyrights owned by the copyright owner. Under such a plan the users and the broadcasting stations would have a right to supervise the amount of copyrighted music that it would use and pay according to the amount of said copyrighted music used; and the users would be free to negotiate with holders of other copyrights other than the said members of the Society and then they young and new composer in Montana would get a break; that the "per piece plan" would tend to restore free competition; likewise it would give to the young and new composer of any individual piece which had succeeded in attracting the public fancy a just reward for his work. For instance, when some piece of music such as "The Music Goes Round and Round" is demanded hundreds of times, the users would pay each time for the performance of said piece and the amount earned by said piece would vary directly in amount with its popularity; that the adoption of such a plan would be in keeping with the spirit of this country and would open the door for free competition between the copyrights held by the Society and other persons not members of the Society who own copyrights to music.

(Signed) Harold Weeks.

Subscribed and Sworn to before me this 12 day of April, 1937. (Signed) Kenneth Davis, Notary Public in and for the State of Washington, residing at Seattle.

Filed April 22, 1937. C. R. Garlow, Clerk, by H. H. Walker, Deputy Clerk.

[fol. 284] Clerk's certificate to foregoing paper omitted in printing.

[fol. 285] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS ON BEHALF OF DEFENDANTS—Filed June 25, 1937

Come now the defendants in the above entitled cause, and jointly and severally move this court to dismiss the Bill of Complaint, upon the grounds and for the reasons stated herein, and upon the facts appearing upon the face of said bill and dehors said bill, as hereinafter more particularly set forth, to-wit:

[fol. 286] I

That this case does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, in that the amount or value of the subject matter in dispute does not exceed the sum of three thousand dollars ($3,000.00), exclusive of interest and costs, and that in this regard, it, among other things, more particularly appears:

1. That the individual complainants are exempt from the operation of the act (Section 3—See Exhibit "E", Bill of Complaint, page 75).

2. That the complainant, American Society of Composers, Authors and Publishers, is "a voluntary, unincorporated, non-profit corporation" (Bill of Complaint, page 19) and will suffer no loss in complying with the act.

3. That complainants cannot aggregate the amounts in controversy in order to secure the requisite jurisdictional amount.

4. That the act (Section 4—Bill of Complaint, page 75) does not require any filing or license fee to be paid by complainants, or any of them.

5. That the act (Section 2—Bill of Complaint, page 74) imposes a criminal penalty for the use of the copyrighted compositions, or any of them, belonging to the complainants, or any of them, without the consent of the owner

thereof; that this provision is itself a restrainer against unauthorized use of copyrighted works, and that hence complainants have adequate protection against any monetary loss in that regard.

6. That the only immediate requirement of the act is that the persons within the class regulated file in the office of the Secretary of State of the State of Washington a list of [fol. 287] their copyrighted work, together with a list of prices for their various copyrighted works (Section 2—Bill of Complaint, page 75), without any filing fee being required for so doing.

7. That the act does not attempt to prevent complainants from doing business; and that the Bill fails to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute will involve.

II

That the court is without jurisdiction, in that no substantial Federal question is presented by the Bill of Complaint.

III

That there is a misjoinder of parties plaintiff, to-wit: that each of said complainants, Carl Eischer, Inc., G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, as shown by Exhibits "A", "B", "C", "D" and "E" attached to the Complaint, have heretofore executed valid assignments of their entire repertoire of copyrights to the American Society of Composers, Authors and Publishers, and do not now have a sufficient interest to be properly joined as parties plaintiff in this action, and that the statute involved expressly exempts complainants, as individuals, from its operation.

IV

That said Bill of Complaint does not state any matter of equity entitling complainants to the relief prayed for, nor are the facts as stated sufficient to entitle complainants to any relief in equity against these defendants, or any of them, and that in this regard, it, among other things, ap- [fol. 288] pears:

4. That the individual complainants have an insufficient interest to entitle them personally to the extraordinary relief by injunction.

2. That no action is maintainable on behalf of American Society of Composers, Authors and Publishers, because the case does not fall within the New York statute giving such associations a right to sue by its president in certain cases.

3. That complainants have a plain, speedy and adequate remedy at law, in that

(a) Complainants can adequately interpose a defense to any criminal proceeding brought under the act (Section 11—Bill of Complaint, page 81), and such right of defense is an adequate remedy at law; and

(b) That complainants can adequately interpose their defense in any injunction suit brought by any prosecutor under Section 9 of the act (Bill of Complaint, page 78), it being specifically provided in Section 10, Bill of complaint, page 80, that no right of any person shall be affected in the state courts "without full and complete due process of law."

4. That defendants assert that they do not intend to enforce the criminal penalties of the act until the validity of the act is adjudged.

5. That there is no sufficient allegation that complainants have not complied or cannot comply with the statute, or that they have made any attempt to comply.

[fol. 289] 6. That Section 2 of the Act, Bill of Complaint, page 74, contains an effective prohibition or injunction in complainants' favor, in that any one using any of complainants' copyrights without the consent of the owner, becomes subject to the criminal penalties of the act (Section 11—Bill of Complaint, page 81); that there is no allegation that complainants' copyrights are being illegally used in Washington, or that the appropriate public officials arbitrarily refused to prosecute such illegal use.

7. That mere unconstitutionality, even assuming it to exist, does not warrant injunctive relief, but that the facts alleged must bring the case within the recognized rules of

equity relating to injunctions, and that complainants have not done so.

8. That said statute, in so far as any question now justiciable is concerned, is a valid exercise of the police power of the State of Washington

Wherefore, the defendants and each of them pray that the Bill of Complaint filed in this cause be dismissed, with costs to the defendants.

G. W. Hamilton, Attorney General of the State of Washington; E. W. Donnelly, Assistant Attorney General of the State of Washington; B. Gray Warner, District Attorney of King County, Washington; Edwin C. Ewing, First Assistant District Attorney of King County, Washington; Harry H. Johnston, District Attorney of Pierce County, Washington; Ralph E. Foley, District Attorney of Spokane County, Washington; A. W. Swanson, District Attorney of Snohomish County, Washing-
[fol. 290] ton; H. W. Covalt, District Attorney of Whatcom County, Washington; Smith Troy, District Attorney of Thurston County, Washington; Paul O. Manley, District Attorney of Grays Harbor County, Washington; John D. Evans, District Attorney of Yakima County, Washington; Glenn L. Bean, District Attorney of Walla Walla County, Washington; Alfred J. Schweppe, Seattle, Washington; McMicken, Rupp & Schweppe, Seattle, Washington, Solicitors and Attorneys for the Defendants.

Receipt of a copy of the foregoing Motion to dismiss is hereby acknowledged this — day of June, 1937.

——— ———, Solicitors & Attorneys for Complainants.

Copy Received June 21, 1937. Vanderveer & Bassett, Attorneys for Compl.

[fol. 291] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF ERVIN E. KING, STATE MASTER OF WASHINGTON STATE GRANGE, IN RESISTANCE TO APPLICATION FOR INJUNCTION—Filed June 25, 1937

Ervin E. King, being first duly sworn on oath deposes and says; that he is the State Master of the Washington State Grange; that the radio broadcasters were not the only parties in this state who urged the passage of Chapter 218, Laws of 1937, but affiant also urged its passage and personally appeared with others and requested the Governor of this State to attach his signature thereto;

[fol. 292] That affiant has had some experience with the American Society of Composers, Authors and Publishers on several occasions in the past and sincerely believes that they need State regulation to the end that the user of music can pay for what he uses and determine from the Secretary of State's Office the true ownership and title to such music; that neither affiant, nor the Grange, nor anyone with whom affiant is associated, wants to use music for nothing but is ready and willing to pay such owners for the use of their music each time it is used by it, but affiant and the Grange are not willing to pay for music not used by it which is the case under the Society's blanket licenses; that a per-piece plan and this Statute will cure the existing evils in this state in relation to the use of music and will give everyone a fair deal in the premises.

Ervin E. King.

Subscribed and Sworn to before me this 23d day of June, 1937. Earl G. Dorhner, Notary Public in and for the State of Washington, residing at Spokane. (Seal.)

Copy Received Jun. 25, 1937. Vanderveer & Bassett, Attorneys for Compl.

[fol. 293] [File endorsement omitted]

Copy Received Jun. 25, 1937. Vanderveer & Bassett, Attorneys for Compl.

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF DON ISHAM, MUSICAL DIRECTOR OF RADIO STATION "KOL", OF SEATTLE, IN RESISTANCE TO TEMPORARY INJUNCTION—Filed June 25, 1937

Don Isham, being first duly sworn, deposes and says:

That he is the Musical Director of radio station "KOL" at Seattle, Washington; that he has had fourteen years experience in professional music the last four of which have been in directing programs with radio stations.

That affiant is in full accord with the Second section of the [fol. 294] said statute, which provides a penalty for the performance of music for profit without the owner's consent, and that neither he nor anyone with whom he is associated or acquainted in the broadcasting industry desires to use the music of others without compensation at prices to be fixed by the respective owners of the performing rights; that affiant is ready and willing to pay such owners for the use of their music each time it is used, but not for their music not used, nor for music owned by someone else, nor for blanket permission to use music which its supposed owners are unwilling to specify and designate; that efforts have been made to obtain a license providing for royalty payments based on the number of performances of copyrighted musical compositions owned and controlled by the said society and the members thereof, but that the said society and its members acting through it have refused to agree to royalty payments based upon the actual use made of their musical compositions; other proposals submitted to the society looking toward a "per piece plan" have also been rejected by the society; that in spite of the many valid objections thereto, affiants station had to enter into a similar contract as that set forth by the said Bill of Complaint as Exhibit "F", for the reason that said Station KOL was forced to do so in order to continue in the broadcasting business by reason of the facts hereinafter set forth;

That before the development of the radio, the complete stage performing rights were most important and were designated by the music publishing industry as the "grand performing rights"; that the other rights of performance for profit were called "small performing rights"; that the publishers of music in most cases required that authors and composers, as a prerequisite to the publication of their music, assign to the publishers what is known as the small performing rights; that as a result of the development of the radio the small performing rights became the most important, due to the fact that the performance of music over the radio became by far the most lucrative, and what was known as the grand performing rights upon the stage became of [fol. 295] very minor consequence; that the same developments made authors' and composers' royalties upon sheet music, phonograph records, and automatic piano rolls almost nominal, and as a result the small performing rights required by the publishers, as a prerequisite to the publication of the music as aforesaid, became by far the most important privilege under federal copyrights; that the said A. S. C. A. P. is an organization of composers, authors and publishers, but that it is dominated and controlled by a small group and is operated mainly for their benefit and for the protection and enforcement of their said personal interests; that the membership of the society comprises approximately 100 publishers and approximately 780 authors and composers; that few publishers of consequence are not members, but that hundreds of authors and composers are not and cannot become members; that the membership of the said society is strictly controlled by its manager or chairman E. C. Mills, who is neither a composer nor an author; that comparatively few authors and composers are admitted to membership, but that the said society, according to its own statements, includes approximately 90% of the leading publishers of copyrighted musical compositions in the United States, who control and own approximately 95% of the copyrighted acceptable and popular musical compositions published in the United States, "acceptable and popular" music being defined as that which appeals to the great mass of the people, as distinguished from standard, church, educational, and other musical compositions; that practically all composers and authors of music, whether members of the society or not, are compelled by the music publishers to assign to them the so-called "small performing

rights", as aforesaid, and that the said publishers have, as shown in the said Bill of Complaint, transferred all of the said rights to A. S. C. A. P. for the purposes hereinafter set forth; that by reason of its ownership of approximately 95% of the acceptable and popular music of the United States, as it says, the said A. S. C. A. P., as conducted by the manager and board of directors thereof, constitutes a virtual monopoly of the said music; that the said society refuses to license the performing rights owned by it except through contracts such as that shown in Exhibit "F" of the Bill of Complaint, and refuses to furnish to the licensees, [fol. 296] any list or catalogue of the musical numbers, the performing rights for which are owned or claimed by it or included in the said blanket license; that in addition to refusing the said information to the parties most interested, namely, those who have paid for the right to use the said music of A. S. C. A. P., the said society retains the right to issue what it calls a restricted list of music, for which express permission must be obtained and mention made in the broadcast of the show or movie from which it is taken; and that the said restricted list is the only list of music furnished to licensees by it; that the Society's restricted list is really a "per piece" plan and is now in use and operation by said Society, so the present "per piece" plan is not new and novel to the Society; that the society's claims are conflicting and ambiguous and that it is impossible for affiant or any other licensee to ascertain the facts concerning the ownership of the performing rights unless the same are filed; that E. C. Mills, the present manager or chairman of the society, stated in a hearing before the Committee on Patents of the House of Representatives of the 74th Congress, that the society has an index of nearly 3,000,000 ti-les of musical compositions; that the said testimony appears on page 190 of the published record of the said hearing; that it is clear from his said statement that the Society must now have, or could readily prepare a list of its own copyrighted music, and that it is incredible that the society would attempt to operate or to enforce its rights without such a list; therefore, no cost or damage can be sustained by the Society since its list is already built and no "filing fee is required by the Statute;

It is disclosed by the certified statement of the Register of Copyrights annexed to Intervenors Motion to Dismiss

as Exhibit "A", that no such number of copyrighted musical compositions exist in the United States; that a published copyright is one in which the musical composition has been reproduced for sale to the public and has been placed on [fol. 297] sale, sold or publicly distributed; that in addition to original musical compositions the figures representing the total published copyrights include; (a) many compositions theretofore entered in unpublished form; (b) copyrights entered on recordings of compositions, the entries covering the particular recordings only, including automatic piano rolls with marginal directions for playing, and not representing the copyrighting of the original compositions; (c) copyrighted special arrangements of melodies in the public domain; and (d) copyrighted books of songs; that the only copyrights of consequence to the radio industry are those shown in said certificate of the Register of Copyrights in the column showing new published copyrights for the last twenty-eight years (1909 to 1936, inclusive), and the renewals shown in the last column; that, including renewals of Plaintiffs, there are not any 3,000,000 numbers entitled to Copyright protection; that as hereinbefore stated, not all of those copyrights represent separate musical compositions, but that if they did, the total number, as shown by the said columns, would be only 569,107; that although the said society refuses to make public a list of its titles, the actual number thereof was indicated in 1935 by a petition filed by it in the Superior Court of the State of Washington for the County of Thurston in the case of State of Washington ex rel. A. S. C. A. P. vs. D. F. Wright, Judge, Cause No. 26118; that as a result of a disagreement, the seven publishing houses controlled by Warner Brothers and mentioned in the said petition, had withdrawn, or attempted to withdraw, from A. S. C. A. P.; that the society has stated that the seven said publishers owned at least 40% of the repertory of A. S. C. A. P. and in the petition proceeded to [fol. 298] allege as follows:

"Your petitioner further represents that at the time of the entry of said decree of injunction the following corporations, all of whom were members of this defendant associa-

tion, owned the number of copyrighted musical selections set opposite their respective names:

Harms Inc.	3,958
T. B. Harms Co.	373
Remick Music Corporation	4,509
M. Witmark & Sons	11,101
Victoria Publishing Company	100
New World Music Publishing Company	71
Shubert Publishing Company	50
	20,162"

that if the said seven publishers owned by Warner Brothers, as aforesaid, was the owner of 40% of A. S. C. A. P.'s list, then A. S. C. A. P. can control only and approximately 50,400 musical compositions in spite of its prior claim of 2,000,000 and 3,000,000 numbers; thus by the filing of their list, this point will be clarified; that in addition to the said approximate number of musical compositions owned by A. S. C. A. P., there are, as shown by the said certificate of the Register of Copyrights, over 500,000 copyrights not controlled by them; and that in addition there is an indeterminate but enormous number of musical compositions which are not subject to copyright and which are generally referred to as being "public domain" music; that many of the uncopyrighted pieces are publicly performed over the radio, but that music the copyright to which is not owned by A. S. C. A. P., is not ordinarily played, for the reason that the said society's contracts are so burdensome that it is practically impossible for broadcasting stations to pay for the right to use music copyrighted by others, as was shown in the attempted withdrawal of the Warner Brothers publishers, from A. S. C. A. P. in 1935; that as Exhibit "P" discloses, the independent radio stations, such as "KOL", even though a network affiliate, are compelled to pay A. S. C. A. P. not only a flat license charge but also 5% of all their income from the sale to advertisers of operating time and from all time devoted to the broadcasting of lectures, [fol. 299] dramatizations, sporting events and other programs, whether or not the music of the society, or any music at all, is used, allowing not over 15% for commissions actually paid out, although the usual commissions are higher; that discriminatory contracts have been made by A. S. C. A. P. with certain newspaper-owned radio stations

of large power and large potential audience, at lower prices, and with the national networks for the use of their music without charge; that by reason of the said facts, the music of composers, authors and publishers not belonging to the society are practically barred from performance over the radio and from the most lucrative feature of their copyright privileges; that through the said A. S. C. A. P. contracts the users are compelled to pay for the use of the entire repertory of the said society, regardless of the comparative worthlessness of the greater number of its compositions for the purpose, and although a comparatively small number are used to any considerable extent or can possibly be used in the broadcasting time available;

That due to the society's refusal to furnish a list of its copyrighted compositions, affiant has no way of determining what proportion of the time on KOL is taken by A. S. C. A. P. music, but affiant knows that considerable parts of the time are used for public domain music, grand performing rights, such as broadcasting operas, and other music not controlled by the society but nevertheless, the Society is paid for the rights to use such music, which is unfair; that it is a matter of common knowledge that many pieces are not played at all but that others are repeated many times during their periods of popularity; that it has been necessary for every radio station on occasions, for its own protection, to keep a list of the musical numbers performed by it for its protection against infringement suits; that in keeping such a list, it is feasible and in the interest of the users of music, as well as to the owners of performing rights, whether members of A. S. C. A. P. or not; that payment would be readily made therefor on a per piece [fol. 300] basis, in other words, according to the number of performances thereof; that such method of payment would allow the owner of each copyrighted piece of music, whether author, composer or publisher, and whether a member or non-member of the society, to receive just compensation in proportion to the popularity of his music and the use made of it; that music is made popular by broadcasting and that affiant's station has received great numbers of requests from authors, composers and publishers, many of whom are members of the society, for the free performance of their numbers in order to popularize them, but KOL cannot safely comply with their requests due to the uncertainty as to the ownership of performing rights; that by reason thereof

the radio operators cannot safely aid in the popularization of the music of non-members of A. S. C. A. P., even without charge for the use of the offered music; that by reason of the combination, conspiracy and concerted action of the members of said society, users are obliged to accept a blanket license as heretofore stated upon terms and conditions imposed by said society, and the members thereof have thereby secured practically the exclusive use of radio broadcasting and the other industries using music as a means of conveying their musical compositions to the ear of the public at large, and have destroyed the incentive and opportunity of said users to use the musical compositions of composers, authors, and publishers who are not members of said society and have prevented non-members thereof from receiveing the compensation for the rights of public performance of their musical compositions, which they would otherwise receive, and have limited and restricted the popular demand of the listening public to musical compositions controlled by said society; that the members of said society, through it, have been and are enabled to enforce, and have been and are now enforcing acceptance of their arbitrary and non-competitive demands for royalties upon all classes of entertainers using music, for the reasons that such entertainers must perform those musical compositions demanded by [fol. 301] their audiences; that the limitations and restrictions of popular demand to the musical compositions controlled by said society has forced such entertainers to obtain from said society, a license to perform music controlled by it and so demanded by the public, as the public not having the opportunity to learn of unknown compositions, demands only the known compositions; the members of said society, through it, have concertedly refused to grant such entertainers permission to perform individual musical compositions selected by the entertainers, but have insisted and still insist that general licenses be accepted which cover all the musical compositions of all the members of said society, upon payment of a fixed amount thereof, irrespective of whether one or more of such musical compositions are actually performed; that by this method of licensing, the members of said society have further restricted the popular demand to those musical compositions owned or controlled by them, and have prevented the use of musical compositions owned by non-members of said society, including composers who reside in the State of Washington; that by

reason of this concerted action of the members of the society in refusing to issue licenses for the public performance of musical compositions owned or controlled by them, except upon the terms and conditions above set forth, the members of said society, as aforesaid, have prevented and are preventing the advertisement and popularization of, and therefore the sale of, musical scores owned by composers, authors and publishers in the State of Washington who are not members of the society; that the society has adopted and maintains a comprehensive system for the acquiring of detailed and complete information relative to the musical compositions used by broadcasting stations, by means of which information its members have been and are enabled to conduct their operations through said society so as to prevent the development of competition between members thereof and owners of copyrighted musical compositions who are not members of the society; that by these means, members of the society have maintained and utilized the so-
[Vol. 302] ciety as an instrumentality of oppression, monopoly and price-fixing within the State of Washington; that affiant's station has unwillingly and through compulsion been forced to accede to the illegal and unlawful monopoly of said society and its members for the reason that each and every radio station must take any contract offered by the society or be closed up by it; that the said E. C. Mills has stated on occasions that he can close us up or charge us what he pleases; that we are compelled to submit to said society's action in controlling and fixing prices and limiting free competition in the sale of the performing rights of all musical compositions, to the detriment of the citizens of the State of Washington, by their threats to close us up unless we submit to their demands; that it is impossible for affiant to identify the particular compositions of which the society claims ownership or control, for the reason that it refuses to furnish or file a list of its compositions and in effect has informed us that we must determine at our own peril which compositions they control; that the notices given users of music to take a license from the society or render no performance for profit of a musical composition owned or controlled by them does not furnish the user with any aid in determining what compositions they purport to control; these notices simply set forth a formidable list of laws and decisions, together with a list of their members and affiliates; that on November 27, 1935, Warner Brothers,

then and now members of A. S. C. A. P., stated when they resigned or attempted to resign therefrom:

"The Society at present is being run by a well-entrenched clique of executive officers who sign contracts and perform other important acts on their own authority, the board of directors in many cases having no opportunity to revise transactions until the society has been committed to them * * *."

"* * * These executive officers have very little at stake financially in comparison with the publishing firms that are threatened with extinction, although it must be said that the salaries paid the Society's executives are certainly not small, Mr. Mills, the General Manager, receiving about $50,000 a year for his service, and Mr. Buck, the president, about $35,000 * * *."

[fol. 303] "* * * Furthermore, the distribution to authors and composers of the various funds collected by the society is conducted in an illogical manner based mainly upon favoritism and politics. * * *"

"* * * The Society has not kept pace with the new uses of music, radio being the most glaring instance. Twenty years ago, when the Society was formed, radio was unknown. The astounding progress of broadcasting presented a problem to the Society which it has utterly failed to solve in the fair and reasonable interests of the creators and publishers of music."

"While it is true that most authors and composers have signed the Society's contract, they have done so without being given the benefit of an alternative or (in most cases) of a knowledge of the complete workings of the Society and the difficulties at present confronting it. One result of our resignation will be the opportunity opened for new writing talent, which has hitherto found it extremely difficult to obtain membership in the Society. The field will be open for unestablished authors and composers of real ability."

"The arrangements made by the Society have unduly favored the big radio chains over the independent stations."

That if the owners of the performing rights who have associated themselves together in A. S. C. A. P. will comply with the law and will file in the office of the secretary of state their respective numbers together with the charges demanded by them for the use thereof, it will be easily possible for radio stations and other users to select the num-

bers desired by them and to pay therefor; that there will result a free and unrestrained competition among the owners of said copyrights and a fair and proper compensation for the use of each copyrighted composition; that at the time of the said disagreement between A. S. C. A. P. and the said Warner Brothers' seven publishing companies, catalogues were issued by each of the seven companies showing the respective compositions owned or controlled by them; that it is apparent from these catalogues and from the restricted list used by the society that each member can easily provide one such list each year and bring it up to date by yearly additions; that it would be easy to set forth after each number a basic price for its use, together with varia-[fol. 304] tions of said price in accordance with the use to be made thereof, based upon the power and potential audience of the radio station using the same, and the possible audience and use by other establishments; that a compliance with the said requirement will, therefore, not be unduly burdensome nor constitute a taking of the copyright owners' rights without due process of law; that the requirement of the Washington statute in question, which compels the owner of a copyright, if a member of such a combination as A. S. C. A. P., to file a list of said copyrights, is a reasonable and proper requirement; that Mr. Mills, the manager or chairman of the society, testified to the reasonableness of such a requirement in a hearing before the Committee on Patents, House of Representatives, 74th Congress, 2nd Session, Page 190 of the Published record, as follows:

"The added requirement in the existing law, that works in which the creator desires a copyright must be registered, we have always regarded as a reasonable and safe requirement, though it places somewhat of a burden upon us. If you wish to own real estate safely, you must record your deed. If you wish to own any property safely which you buy, you must get an authentic bill of sale, a receipt that shows that title to the property has been conveyed to you. *What is there unreasonable in requiring a person who desires to assert the ownership of a copyright—the exclusive, entire and complete ownership of a copyright as against the whole world—to register the claim and file a copy of the work? That is particularly necessary, in my own opinion, because the property itself is intangible, and there should be a record of what it is.*"

that affiant verily believes that for these said facts and reasons, the practice provided by the statute will be much more just and reasonable than the restraint of trade and price fixing resulting from the combination of the society and its members, who are the complainants herein; that in March of 1932, Mr. Gene Buck, President of the Society, at page 213, Hearings before Committee on Patents, 72nd Congress, 1st Session, H. R. 10976, made the following statement to the Committee on Patents, in contradiction of a statement made by Mr. Frank Boland, Counsel of the American Hotel Association:

Mr. Boland: The American Society of Composers, Authors and Publishers, I believe—I may be wrong—does [fol. 305] not control much more than one-half of the popular music.

The Chairman: Why, Mr. Buck told me they control 95 per cent.

Mr. Buck: The copyrighted works.

The Chairman: Can you prove that to me?

Mr. Buck: Yes.

A letter from Mr. E. C. Mills, as General Manager of the Society, to the Hon. Roy C. Woodruff, Congressman, dated January 10, 1933, in referring to the music which the Society controlled, stated:

It is perfectly true that most of the desirable and usable copyrighted music is thus controlled.

that the music publishing businesses, in practically every instance, are the owners of the copyrights. Mr. E. C. Mills, the Society's manager, stated before the Eighth Annual Convention of the National Association of Broadcasters, November 17 19, 1930, at Cleveland, Ohio, that:

"For practical purposes, there would be only about 80 different copyright owners probably inasmuch as *copyrights are habitually vested in the publisher—not the author but the publisher—exercises the copyright and, in respect to performing, acquires that protection through the American Society.*"

Article V, Section 2, of the Articles of Association of the Society authorizes its board of Directors to fix the amount of license fees charged by the Society. In the hearings

before the Committee on Patents, House of Representatives, 68th Congress, first session, on H. R. 6250 and H. R. 9137, held during the period April 25-May 6, 7 and 8, 1934, the following colloquy took place between the Chairman of the Committee and Mr. E. C. Mills, General Manager of the Society, as shown at page 152 of the printed Hearings:

The Chairman: Your conclusions are that you are covered by the copyright as the present law exists and it is only a question with you as to how much you ought to charge. You can charge anything you want to; is not that your position?

[fol. 306] Mr. Mills: I should say that under the law as it exists at present there is no limit to which we could charge.

The Chairman. I say, you could charge 10 *cents* or *a hundred dollars.*

Mr. Mills: Yes.

The Chairman: I want to be clear on that.

Mr. Mills: *Or forbid the use of the publication altogether.*

At a conference on September 20th, 1922, in the Society's office, and continued on October 25th, 1922, a printed copy of the stenographic report of this meeting was distributed to the public by the Society, and Mr. Mills made the following statement on page 18 of said report:

Mr. Mills: Now, I have been a showman for a good many years—long enough to know that I know nothing about the show business; it's a game that will convince any man if he just stays in it long enough that he knows nothing about it—and I think it was made clear, and agreed upon by us all at the last conference, that it is of vital importance to the future broadcasting that you gentlemen shall arrange entertaining programs. *You cannot do that without broadcasting material copyrighted by members of this Society.* You can broadcast occasional programs, and many of them, without using our material, *but you will find our material absolutely essential to a continued well-balanced, universally entertaining service.*

And on page 29 of the report appears the following:

Mr. Mills: It may be true that if all the copyright proprietors, those represented by the Society and others, demanded substantial fees *they would close you up, but within*

the catalog of the copyright proprietors represented by the American Society of Composers, Authors and Publishers there is a sufficient repertoire to take care of your needs, even independent of any other copyright proprietors, and to do so thoroughly and efficiently for a long time, if not indefinitely."

These statements show conclusively that the Society has all users of music precisely where they want them, and that the Society discourages our using the music of non-members, and that they should be regulated by the State of Washington.

[fol. 307] To show the ease with which the Society could conform to this statute affiant attaches hereto, as Exhibit "A" a form prepared by the Society and furnished affiant by the Society's former agent in this state; by simply adding their price to this form now used by the Society, and furnishing them to the stations, they could readily comply with this statute.

Don Isham.

Subscribed and sworn to before me, this 24 day of June, 1937. Kenneth C. Davis, Notary Public in and for the State of Washington, residing at Seattle. (Seal.)

Copy Received Jun. 25, 1937. Vanderveer & Bassett, Attorneys for Compl.

(Here follows one photolithograph, side folio 308.)

EXHIBIT "A" TO AFFIDAVIT

RECORD OF MUSICAL PROGRAM

TITLE OF PROGRAM_____ DATE _____ 193__

TIME _____ M. STATION _____ LOCATED AT _____

No.	TITLE	COMPOSER	AUTHOR	COPYRIGHTED BY (PUBLISHER)
1				
2				
3				
4				
5				
6				
7				
8				
9				
10				
11				
12				
13				
14				
15				
16				
17				
18				
19				
20				
21				
22				
23				
24				
25				

REMARKS_____

CORRECT: _____ CONDUCTOR _____ MONITOR _____ ANNOUNCER

DUPLICATES OF THIS PAD MAY BE ORDERED FROM THE BUSINESS PRESS, INC., 200 VARICK STREET NEW YORK CITY

[fol. 309] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF MIKE LYONS IN RESISTANCE TO TEMPORARY INJUNCTION—Filed June 25, 1937

Mike Lyons, being first duly sworn on oath deposes and says that he is the owner of the Lyons Music Hall in Seattle, Washington; that he is ready and willing to pay for music used by him but is not willing to pay for music not used by him; that a "per piece" plan and the requirement in the Statute that combinations and pools of copyright owners file their list of holdings is fair and reasonable;

That under the licenses issued by the Society, and they [fols. 310-314] refuse to issue any other, the affiant must pay the Society for the right to use religious music, not even controlled by them, as well as for the right to use their popular music, in his dance hall; that the authors should be paid, and affiant is willing to do so, but affiant is not willing to pay for the use of music not even controlled by the Society; that if a list is filed affiant can then pick out and pay for what music he needs and uses or leave it alone; that many of the compositions controlled by the Society are not suited for affiant's business, yet affiant, under the license offered by the Society, must purchase the entire repertory or none at all; affiant has resisted this type of license heretofore, and the Society promptly sued affiant for infringement; I now have the choice of taking a license, on their terms and at their price, or see my business wrecked.

Mike Lyons.

Subscribed and sworn to before me this 24th day of June, 1937. Kenneth C. Davis, Notary Public in and for the State of Washington, residing in Seattle (Seal.)

Copy Received Jun. 25, 1937. Vanderveer & Bassett, Attorneys for Compl.

[fol. 315] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENOR JOHN G. LOCKHART'S MOTION TO DISMISS—Filed June 29, 1937

Comes now Intervenor, John G. Lockhart, by his attorney, Clark R. Belknap, and moves the Court to dismiss the Bill of Complaint herein for the following reasons:

I

That the Complainants herein have no capacity to bring this suit.

II

That said Bill of Complaint does not state the facts sufficient to constitute a cause of suit.

III

That the Court has no jurisdiction over the persons of the defendants and of the subject matter of this suit.

IV

That there is a defect in the parties Complainant.

Clark R. Belknap, Solicitor for Intervenor John G. Lockhart.

Copy received Jun. 25, 1937. Vanderveer & Bassett, Attorneys for ——.

[fol. 316] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING PETITION IN INTERVENTION OF K. M. O., INC., AND PETITION IN INTERVENTION OF JOHN G. LOCKHART—June 29, 1937.

On this 29th day of June, 1937, Petition of K. M. O., Inc., to Intervene and Petition of John G. Lockhart to Intervene comes on for hearing before the three-judge Court sitting [fols. 317-318] en banc in the above entitled case, Complainants appear by Messrs. Vanderveer and Bassett, their counsel, and by L. D. Frolich, entered as associate counsel, and Petitioning Intervenor, K. M. O., Inc., appearing by its solicitors, Messrs. Kenneth C. Davis, Clarence C. Dill and Leo Teats, and Petitioning Intervenor, John G. Lockhart, appearing by his solicitor, Clark Belknap.

Complainants object to Petition of above named intervenors to Intervene; objection is overruled and the intervention of said Petitioning Intervenors is allowed.

[fol. 319] [File endorsement omitted]

Schedule "A"

In United States District Court

[Title omitted]

Transcript of Proceedings on Application for Interlocutory Injunction, etc.—Filed August 12, 1937

Be it Remembered that this matter came on for hearing in the Court Room of the above entitled court at Tacoma, Washington, at 10:00 o'clock in the forenoon on June 29, 1937, before a statutory three-judge Court composed of [fol. 320] Honorable Bert Emory Haney, United States Circuit Judge for the Ninth Circuit, Honorable John C. Bowen, United States District Judge for the Western District of Washington and Honorable Edward E. Cushman, United States District Judge for the Western District of Washington, pursuant to an Order entered herein on June 9th, 1937, upon Complainants' application for an interlocutory injunction, motion to dismiss on behalf of defendants, the petition of K. M. O., Inc., a corporation, for permission to intervene and for permission to file and argue motion to dismiss, the petition of John G. Lockhart to intervene and to file a motion to dismiss.

Complainants appeared by George Vanderveer of Vanderveer & Bassett, Solicitors for Complainants, 1311 Alaska Building, Seattle, Washington, and Louis D. Frohlich of New York City, their General Counsel; defendants appeared by G. W. Hamilton, Attorney General of the State of Washington, E. B. Donnelly, Assistant Attorney General of the State of Washington, B. Gray Warner, District Attorney of King County, Washington; Edwin C. Ewing, First Assistant District Attorney of King County, Washington; Harry H. Johnston, District Attorney of Pierce County, Washington; Ralph E. Foley, District Attorney of [fol. 321] Spokane County, Washington; C. C. Dill, representing the District Attorney of Spokane County, Washington; A. W. Swanson, District Attorney of Snohomish County, Washington, H. W. Covalt, District Attorney of Whatcom County, Washington; Smith Troy, District Attorney of Thurston County, Washington; Paul O. Manley,

District Attorney of Grays Harbor County, Washington; Robert J. Willis, District Attorney of Yakima County, Washington; Glenn L. Bean, District Attorney of Walla Walla County, Washington; Alfred J. Schweppe, Seattle Washington, McMicken, Rupp & Schweppe, Seattle, Washington, Solicitors and Attorneys for Defendants.

Honorable C. C. Dill, Hutton Building, Spokane, Washington and Kennith C. Davis, 1514 Northern Life Tower, Seattle, Washington and Leo Teats of Tacoma, Washington, appeared for Intervenor, KMO, Inc.

Clark Belknap, 512 Hoge Bldg., Seattle, Washington, appeared from Intervenor John G. Lockhart.

Whereupon, the following proceedings were had, to-wit:

Judge Haney: The motion to intervene in both instances will be allowed.

Mr. Vanderveer: We had in mind to mention to the Court the fact that counsel have agreed that a limited amount of testimony may be taken orally, subject of course to the [fol. 322] Courts' approval.

Mr. Dill: If the Court please, counsel has not agreed, as far as this defendant is concerned, to any oral testimony being taken in this case, and I want—I admit I would like to take just a moment to tell my reasons for that, if the Court will hear me.

Mr. Vanderveer: Now, when I said to Your Honors that we had such an arrangement, I refer to an arrangement made with Mr. Donnelly representing the Attorney General and Mr. Schweppe who is representing all of the defendants. and I assumed of course that arrangement was adequate to the needs of the situation.

Mr Dill: The rule of the Court is that if oral testimony is to be taken in a case of this kind, an order must be secured from the Court providing for the taking of that testimony and served on the adverse party. No testimony, as I understand it unless it be testimony on the Court's own motion is to be taken except by order.

Now, there was an order secured in this case. It was secured by complainants' counsel on June 9th, and that order provides for the filing of affidavits, and by the parties hereto. The defendants are given until June 25th to file [fol. 323] their affidavits, and the reply of the affidavits are to be filed on June 28th.

Now, there is no showing here that there is any emergency, that anything has happened that makes it necessary or even justifies the Court in waiving its own rule in this matter. Certainly if witnesses are to be brought in here by the complainants at this time, defendants should have had notice of it under the rule. We might have brought witnesses in reply, and the complainants make no effort here to place it on the basis of any emergency, or any new situation has developed, or even in answer to any reply affidavits that were filed. They had ample time to get their affidavits in, in this matter and it seems to me that the Court cannot under the situation, fairly permit oral testimony here on any subject unless it be a matter which the Court itself may want to be informed about.

Mr. Vanderveer: The burden of counsel's objection seems to be that we have not notified him. I take it that when counsel appearing for the defendants, the attorney and Mr. Schweppe consents that we may do this, that they probably waive notice.

I will say to Your Honor now, the point on which we de- [fol. 324] sire to introduce testimony has to do principally, if not exclusively to certain technical matters involved in the matter of a radio station, about which I apprehend there will be no dispute, but still it may be these are matters which the Court cannot take judicial knowledge, and they can be explained better by the witnesses on the stand and the privilege of examination and cross examination than by mere affidavits.

Judge Haney: I think that we will hear this oral testimony and that counsel may refer to it if necessary in his argument.

Bert F. Fisher, produced as a witness on behalf of the complainants, after being duly sworn, testified as follows:

Direct examination.

By Mr. Vanderveer:

My name is Bert F. Fisher. I reside in Seattle. I am connected with radio stations KOMO and KJR as Secretary of the corporation and General Manager of the stations, which I have been managing since 1925. These stations are

on the air approximately seventeen hours each day. 75% of that time is devoted to the broadcasting of copyrighted [fol. 325] music and musical compositions, of various kinds. In the course of each hour fifteen or more musical compositions or parts of them are broadcast, on an average.

I have no license from any copyright owners other than the American Society of Composers, Authors, and Publishers to broadcast their musical compositions and have never had one to my knowledge. I do not know what musical compositions are controlled by the American Society of Composers, Authors, and Publishers, or how many there are. We make no attempt to confine the broadcasting of your musical compositions owned or controlled by that Society. I do not know how many times a day I violate or infringe somebody's copyright.

Q. If you had no medium by which to secure—through which to secure blanket privilege of broadcasting musical compositions in large numbers, such as you get from the ASCAP, would it be practically possible to operate your station, without infringing?

A. Well, I never know when I am infringing, and I don't know now. We feel that the only protection we have is the license which we get from ASCAP.

Cross-examination:

Mr. Dill: No questions.

[fol. 326] E. Claude Mills, produced as a witness on behalf of complainants, after being duly sworn, was examined and testified as follows:

Direct examination:

Mr. Dill: Before this witness testifies, just what is the line of testimony that is intended that he shall give? He has an affidavit——

Mr. Frohlich: In line with the testimony just given by Mr. Fisher, and it is going to be very brief.

I am the chairman of the administrative committee of the American Society of Composers, Authors and Publishers, having been employed by that society since 1921. Prior to

my present position, I was General Manager. In that capacity I personally have been a party to all the transactions between the broadcasters and the Society throughout the State of Washington and am familiar with the operation of their stations to the extent that we have opportunity to observe them in our relationship with them.

In all the years I have been connected with the Society, no radio broadcaster in the United States, and particularly in the State of Washington ever requested of me a single license for a single composition, and I mean by that some-[fol. 327] thing different from the blanket license.

The Society has never given to any broadcaster to my knowledge any single license to perform a single copyrighted musical composition.

I have offered those broadcasters who are dissatisfied with their licenses an opportunity to cancel their license. I don't recollect whether I made that offer to any broadcaster in the State of Washington. I probably have. It has been made to every station that ever expressed dissatisfaction with the terms of the license.

No radio broadcasting station has ever complained to me that it was compelled to pay damages to the owner of a copyrighted musical composition by reason of its performance of such composition under the license of such Society. Under the contracts that the Society enters into with these radio broadcasters, it warrants and guarantees their right.

Mr. Schweppe: I think in that respect the contract would speak for itself. Does the contract which he sets up——

Mr. Frohlich: The contract does speak for itself. I asked this question to ask another one. Of course the contract is [fol. 328] in evidence. It speaks for itself.

In many cases the Society actually defends broadcasters from time to time for infringement suits brought against the broadcasters. There are several suits now pending against some broadcasters. The Society tries these suits for the broadcasters from time to time.

Mr. Dill: No questions.

Testimony closed.

Mr. Frohlich: That is all the testimony on this side, Your Honor.

[fol. 329] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

Before Haney, Circuit Judge, and Cushman and Bowen, District Judges

ORDER REQUESTING ADDITIONAL BRIEFS, ETC.—Filed February 10, 1938

Seattle, Washington,
February 9th, 1938,
10:00 o'clock A. M.

Judge Haney:

We have asked counsel—or as many as we could reach of counsel—in the case of Buck et al. vs. Case, et al., Number 606, pending in the Court at Tacoma, to appear here this morning.

Earlier we had thought we might ask for re-argument with respect to some questions in that case, but because counsel are so widely dispersed it seems rather unnecessary for us to ask for re-argument.

We do wish to say to such of counsel as are present—and I observe some of them are present—that we think that the right or object to be protected against unconstitutional interference is the right to be free from that interference; we think that the matter in controversy in the instant case is Complainant's right to carry on its business free of the regulation imposed by the Washington statute. The value of that right is the thing that is to be measured by the $3000 limit imposed by the Federal statute.

We invite additional briefs addressed:

[fol. 330] (a) To the value of that right,

(b) To where that value may be found in the record.

Such additional briefs may be filed within twenty days from this date by any parties to the litigation, and we direct attention to:

Henneford vs. Northern Pacific Railway Company decided
y the Supreme Court January 31st, 1938; KVOS vs. Asso-
ated Press, 299 U. S. 269 and McNutt vs. General Motors,
98 U. S. 178. That is all.

We think—that there may be no misunderstanding—that
he Clerk should notify all counsel so if counsel are not
resent they may have an opportunity, if they desire, to
le addition- briefs on these questions.

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fol. 331] IN UNITED STATES DISTRICT COURT

[Title omitted]

RECORD OF HEARING—February 9, 1938

Present: The Honorable Bert Emory Haney, Circuit
udge, the Honorable Judges Edward E. Cushman and
ohn C. Bowen, District Judges. Solicitors Clark R. Belk-
ap, Alfred J. Schweppe and George F. Vanderveer are
resent.

The Court, having heretofore taken the above entitled case
nder advisement, now announces from the bench to such
ounsel as are present, that it now invites additional briefs
n two questions: (a) the value of the right to be mc. s-
red by the $3,000 limit, and (b) where that value may be
ound in the record. Any and all of such briefs are to
e filed within twenty days from this date. The Clerk is
irected to notify all counsel so that if any are not now
resent they may have opportunity to file such briefs. A
emorandum on the requested briefs is filed by the Court
t the request of Mr. Schweppe.

[fol. 332] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

In Equity. No. 606

GENE BUCK, Individually and as President of The American Society of Composers, Authors and Publishers, Carl Fischer, Inc., G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, Complainants,

vs.

OTTO CASE, as State Treasurer of Washington; CLIFF YELLE, as State Auditor of Washington; Ernest N. Hutchinson, as Secretary of the State of Washington; G. W. Hamilton, as Attorney General for the State of Washington; B. Gray Warner, as District Attorney of King County of Washington; Harry H. Johnston, as District Attorney of Pierce County of Washington; Ralph E. Foley, as District Attorney of Spokane County of Washington; A. W. Swanson, as District Attorney of Snohomish County of Washington; H. W. Covalt, as District Attorney of Whatcom County of Washington; Smith Troy, as District Attorney of Thurston County of Washington; Paul O. Manley, as District Attorney of Grays Harbor County of Washington; John D. Evans, as District Attorney of Yakima County of Washington; Glenn L. Bean, as District Attorney of Walla Walla County of Washington; Sam M. Driver, as District Attorney of Chelan County of Washington; "John Doe" and "Richard Roe", Defendants; K. M. O., Inc., a Corporation, Intervening Defendant; John G. Lockhart, Intervening Defendant

MEMORANDUM DECISION UPON COMPLAINANTS' APPLICATION FOR INTERLOCUTORY INJUNCTION AND DEFENDANTS' AND INTERVENING DEFENDANTS' MOTIONS TO DISMISS—Filed May 9, 1938

[fol. 333] Vanderveer & Bassett, 1311 Alaska Bldg., Seattle, Wn., Attorneys for Complainants. Louis D. Frohlich, Herman Finkelstein, H. W. Haughland, Of Counsel for Complainants.

G. W. Hamilton, Att'y General, State of Washington, E. B. Donnelly, Asst. Att'y General, State of Wash., B. Gray Warner, Dist. Att'y, King County, Washington, Edwin C. Ewing, Asst. Dist. Att'y, King County, Wash., Harry H. Johnston, Dist. Att'y, Pierce County, Wash., Ralph E. Foley, Dist. Att'y, Spokane County, Wash., A. W. Swanson, Dist. Att'y, Snohomish County, Wash., H. W. Covalt, Dist. Att'y, Whatcom County, Wash., Smith Troy, Dist. Att'y, Thurston County, Wash., Paul O. Manley, Dist. Att'y, Grays Harbor County, Wash., Robert J. Willis, Dist. Att'y, Yakima County, Wash., Glenn L. Bean, Dist. Att'y, Walla Walla County, Wash., C. C. Dill, Hutton Bldg.; Spokane, Wash., Special Att'y for Ralph E. Foley, Dist. Att'y Spokane County, Washington,

Alfred J. Schweppe and McMicken, Rupp & Schweppe, Colman Bldg., Seattle, Wash., Solicitors and Attorneys for Defendants,

Kenneth C. Davis, % KOL, Seattle, Washington, Clarence C. Dill, Hutton Bldg., Spokane, Washington, Leo Teats, 301 Fidelity Bldg., Tacoma, Washington, Attorneys for Intervening Defendant, K. M. O. Inc., a corporation,

Clark R. Belknap, 512 Hoge Bldg., Seattle, Washington, Solicitor for John G. Lockhart, Intervening Defendant.

Before Haney, Circuit Judge, and Cushman and Bowen, District Judges

The suit is one heard by three judges pursuant to Section 266 of the Judicial Code (Title 28, U. S. C. A., § 380).

Complainants, suing on behalf of themselves and, stating that the questions involved are of common and general interest to all members of the complainant Society, allege [fol. 334] that they sue on behalf of others similarly situated.

The Bill of Complaint alleges:

* * * * * * * * *

"1. The complainant, American Society of Composers, Authors and Publishers (hereinafter referred to, for brevity's sake, as the 'Society'), at all times hereinafter mentioned, was and still is an unincorporated association duly organized and existing under the laws of the State of New York, and has its principal place of business, in the Borough

of Manhattan, City of New York, in the State of New York, in the Southern District of New York. The membership of the Society exceeds 1,000, and is comprised of authors, composers and publishers of musical works; said Society was organized and has been issuing licenses for the public performance for profit of musical compositions copyrighted by its members to users located throughout the United States, including the State of Washington, and said Society has protected the performing rights of musical works copyrighted by said members respectively, against infringement because of the public performance thereof for profit, and continues so to do."

* * * * * * *

The complainant corporations are corporations of the State of New York engaged in the business of publishing musical compositions.

The complainant individuals are citizens of the State of New York and Maine and are either authors or composers of musical compositions, or their surviving relatives.

The defendants are either officers of the State of Washington or prosecuting attorneys of counties of that State alleged to be charged with the duty of enforcing the Act alleged to violate the Constitution of the United States—Chapter 218 of the Laws of 1937 of the State of Washington (Washington Session Laws, 1937, p. 1070) entitled:

"An Act in aid of the Federal Copyright Laws, to assist in effectuating their true intent and their enforcement in [fol. 335] the State of Washington by removing and declaring illegal certain monopolistic abuses and activities wrongfully practiced under the guise of copyrights within the state by price fixing combinations, monopolies, and pools; to enforce the Washington constitutional provisions prohibiting price fixing monopolies and combinations in restraint of commerce and trade; providing penalties for combining rights granted by the copyright laws where the effect of such combination results in the use of copyright privileges as instrumentalities of oppression and extortion within the state in violation of constitutional provisions; and encouraging the rendition, creation and production of copyrighted works among the school children and citizens of the State of Washington; encouraging the marketing and acceptance of copyrighted works, created by the citizens of this state; repealing

certain acts; creating a State Anti-Monopoly Board for a particular function to be exercised only in the event of abuses and violations hereof; defining its duties, and the jurisdiction and duties of courts of record, the duties of the prosecuting attorneys, county auditors, the state treasurer and the secretary of state; and providing for the appointment of a receiver in certain instances; defining certain terms; providing for service of process on nonresidents; prohibiting certain acts; and providing penalties for violation hereof and repealing section 2690 of Remington's Revised Statutes."

The following summary of the Act complainants ask to have declared violative of the Constitution of the United States is sufficient for the purposes of this decision.

Section 2 makes it unlawful for any person, without the consent of the owner of any copyrighted work, to cause it, or any substantial part thereof, to be publicly performed for profit in the State of Washington.

Section 3 forbids two or more persons claiming separate copyrighted works to pool their interests for the purpose of fixing prices on their use or to join together for the purpose of collecting fees or to issue blanket licenses in the State of Washington for their commercial use. Provision is, however, made allowing the issuance of licenses on rates [fol. 336] assessed on a per piece system of usage not to exceed those in effect in other States and that such enactment shall not apply to an individual copyright author or owner.

Section 4 provides that persons pooling their interests in copyrighted musical works shall file a list thereof once a year in the office of the Secretary of State of Washington, together with a list of prices charged therefor, no filing fee being required. Additional information including the titles, dates of copyright, name of the author, publisher and owner and the addresses and residences of those who have at any time had an interest in such copyrighted work, is required to be set forth therein.

Section 5 makes available to all persons for examination such lists and authorizes the Secretary of State to publish the same.

Section 6 makes mandatory the filing of such list if the copyrighted works are used commercially in the State whether originating from a point within or without its con-

fines, providing, however, the individual owner, if not connected with any pool, is exempted from this requirement.

Section 7 declares that the creation of music and its commercial use and of copyrighted works within the State, whether originating at a point within or without the State, if publicly received within its confines, is a business affected with a public interest subject to the State's police power and reasonable regulation, but never in conflict with the copyright laws of the United States. This section further provides that certain things done in violation of the act creates a presumption that such persons have used their [fol. 337] property within the State, giving it therein legal situs; any copyrighted works used or sold for public performance for profit, intended to be heard from a point without or within the State, is declared to be a commercial commodity with a legal situs within the State.

Section 8 of the Act provides that associations violating such act shall be deemed to have been doing business within the State and amenable to the process of its courts; provides that certain described acts in connection therewith shall be conclusive evidence that such combinations, even though non-residents, have accepted the privilege of doing business within the State; that the "use" by an agent of a privilege afforded by the State shall be deemed an acceptance of the Act and construed as an appointment of the Secretary of State of Washington as the lawful attorney upon whom may be served summons and process growing out of a violation of the Act and signify agreement that such service of process is equal to personal service within the State. This section also directs the manner of the service of process upon the Secretary of State and its mailing by registered mail requiring personal delivery.

Section 9 of the Act provides for injunctions issuing in a suit begun by the prosecuting attorney of any county upon such service as described in Section 8 and that the Court shall enjoin persons from violating the provisions of the Act and the Constitutional provisions prohibiting price fixing monopolies and combinations; that if defendants persist in defying the judgment of the court it shall appoint the county auditor as receiver of the copyrighted [fol. 338] works and property of the defendants; that in the event defendants attempt to withdraw such copyrighted works or property from the State in order to violate and

re[illegible]er the Act, and the court's orders, ineffectual, a board consisting of the State Treasurer and State Auditor, with the Superior Court Judge as an advisory member, shall fix a fair and just rate for the public performance for profit of each of the copyrighted works of the defendants upon a per piece system or basis of licensing.

Amounts realized by the receiver are to be placed in a special fund which, less expenses, after one year, together with all copyrighted works of defendants, becomes subject to forfeiture, after notice to defendants and hearing, if defendants continue to wilfully disobey the court's order.

Section 10 provides that the appearance, special or otherwise, of defendants served with process as outlined in preceding sections of the act, shall be deemed as a general appearance.

Section 11 provides that violation of the act is a gross misdemeanor subjecting to punishment by fine or imprisonment in the county jail.

Section 12 provides that if part of the act is held unconstitutional, such holding shall not affect the validity of any other portion of the act.

Section 13 concerns procedure in case injunction suits are instituted by prosecuting attorneys in different counties of the State and in case of a resulting receivership.

The Bill of Complaint alleges:

* * * * * * *

(Par. 8, page 10) "that the value of the copyrights owned by each" (complainant) "publisher is in excess of $1,000,000.00;"

[fol. 339]

* * * * * * *

(Par. 8, page 11) "that each of the publisher complainants would be compelled to expend a sum in excess of $25,000.00 for payment to investigators, lawyers, clerical help and other expenses, in an attempt to compile and formulate a list of their respective copyrights containing the data required by said State statute."

* * * * * * *

That the complainants Buck (Par. 10, Complaint), Taylor (Par. 11, Complaint), Speaks (Par. 12, Complaint) and Hill (Par. 13, Complaint) have created musical works which have been copyrighted and the right of each to col-

lect royalties from his works, as well as his right to secure renewals, are worth in excess of $100,000.00.

* * * * * * *

(Par. 14, Complaint) "that the rights" (of complainants Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa) * * * are of great value and are worth in excess of $100,000.00, with respect to each of said complainants."

* * * * * * *

(Par. 18, Complaint) "at the present time there are approximately 123 publisher members of the Society; there are approximately 1000 writer and composer members of the Society; from time to time said publisher, writer and composer members have entered into contracts with the Society, wherein and whereby said members of the Society have assigned to the Society their respective exclusive right of public performance for profit in their respective musical compositions for periods of five years at a time;"

* * * * * * *

(Par. 21, Complaint) "The users of music have uniformly objected to dealing with individual copyright owners for the licensing of the public performance for profit of particular musical compositions; the practice of the Society has been to license theatres according to their seating capacity, radio broadcasting stations according to their income, power and coverage, and hotels, cabarets and dance halls according to the respective size, business done, number and size of orchestras, methods of performance, income and standing; licenses are granted by the Society to such users in which all the musical compositions owned, written, and composed by members of the Society are made available to such users for use at any time within the contract period without requiring the specific consent of the owner of [fol. 340] the particular composition played; such licenses include likewise the right on the part of the users to publicly perform for profit the musical compositions copyrighted, written and composed by members of societies throughout the world organized on a basis similar to the Society with whom Society has contracts so that by licenses made with the Society the users obtain the right to publicly perform for profit the works of over 44,000 composers, authors and publishers; said rights granted by the Society are of great value to the users who have consistently and uniformly

objected to the separate licensing of individual compositions, on the ground that it would involve a great amount of bookkeeping, clerical hire and expense; the system of blanket licenses conferred by the Society performs a useful service for the users and enables them to have available at all times for their own special purposes a vast reservoir of musical compositions that are pleasing and entertaining to the public, classical, modern, as well as popular; . . .

. . . . . .

"that if the individual complainants were to create an agency within the State of Washington to protect against infringement of their respective musical copyrights by unauthorized public performances for profit and to issue licenses thereunder to users in the State of Washington and check up on the accuracy of uses reported, the cost thereof to each of such individual complainants would be greatly in excess of $10,000 a piece, which expenditure would be necessary in the employment of investigators, clerical help, accountants and lawyers."

. . . . . .

(Par. 24, Complaint) "Upon information and belief, the Society pursuant to the rights vested in it by the contracts made with complainants herein, and others similarly situated, has for many years entered into numerous contracts which are now in force between it and users of music within the State of Washington, in which the Society has licensed such users to publicly perform for profit the musical compositions of its members; there are about 528 contracts in force at the present time from which the Society received for the year 1936 the sum of $60,530.68;"

. . . . . .

(Par. 25, page 28, Complaint) "Under mutual working arrangements with foreign societies, the Society has the exclusive right to and does license within the United States, the public performance for profit of the musical compositions copyrighted by all the members of said respective foreign societies, and said foreign societies have the exclusive right to, and do license within the territorial limits of their respective [fol. 341] countries, the public performance for profit of the musical compositions copyrighted by members of the Society. Under such arrangements between the Society

and said foreign societies, the latter are not required to, and never have, filed lists of the respective works copyrighted by their respective members. The catalogues of musical compositions of said foreign societies exceed many hundreds of thousands of compositions composed and written by more than 44,000 members of such foreign societies, the exact number of compositions being utterly impossible to state at any one time on account of the expiration, renewal and obtaining of new copyrights. The right to perform the musical compositions embraced in said foreign catalogues are included in the blanket licenses issued to individual licensees by the Society in the United States. It is virtually impossible for the Society to obtain the information with respect to foreign copyrights required by Chapter 218 of the Laws of Washington, 1937, and the cost of even attempting to comply with that law would be far in excess of $50,000, and filing of monthly lists of changes would be wholly impracticable, because of expense, distance and the necessity of translations, together with the fact that no arrangements exist with foreign societies providing that such information be furnished. Their 44,000 members are scattered throughout the world, and they are not required to file a complete list of their works in order to enjoy copyright protection in the United States under the Treaties, Proclamations and United States Laws aforesaid."

(Paragraph 26, page 29) "Upon information and belief, compliance with said State Statute would require the Society and its licensees to abandon the contracts between them and would compel each of the complainants, as well as other members of the Society similarly situated to rescind their respective contracts with the Society unless they were willing to have their works used for purposes of public performance for profit in Washington on an arbitrary basis upon a per piece system; complainants and others similarly situated are not willing to permit their musical compositions to be performed within the State of Washington publicly for profit upon a per piece basis or on any basis wherein the fee or compensation would be arbitrarily determined by the State of Washington, or any of its agencies, or by anybody else; complainants believe that such price-fixing would deprive them of the exclusive rights vouchsafed to them under the copyright law; if each complain-

ant would be required to act independently in order to have the right to fix license fees, each complainant would be required to have an investigator covering each of the places of public entertainment and amusement in the State of Washington to determine whether any infringements took place and to determine whether payments were being made in accordance with performances; the establishment of such [fol. 342] an agency would cost each of the complainants many thousands of dollars and would in fact greatly exceed the revenue which each of them might hope to collect in the State of Washington; all the users in the State of Washington paid for the music of the 44,000 composers represented by the Society and its affiliated societies for the year 1936, the aggregate sum of $60,530.68. In the year 1936, the following counties of the State of Washington paid to the Society for licenses to publicly perform for profit musical compositions of complainants and the other members of the Society and all other Societies throughout the world affiliated with the Society, the following sums:

County	Amount Collected
Benton	$469.45
Callom	30.00
Chelan	701.00
Clallan	168.52
Clark	316.13
Columbia	36.20
Cowlitz	62.20
Franklin	45.00
Garfield	40.00
Grand	22.50
Grays Harbor	1,265.68
Island	10.00
Kings	31,669.41
Kitsap	254.15
Kittatas	126.60
Klickitat	30.00
Lewis	443.70
Lincoln	15.00
Mason	62.50
Okanogan	123.25
Pend Oreille	49.80

County	Amount Collected
Skagit	37.50
Snohomish	661.77
Spokane	16,445.63
Thurston	384.02
Walla Walla	906.29
Wahkiakum	15.00
Whatcom	986.75
Whitman	258.90
Yakima	932.10
Making a Total of	$60,530.68

The proportion collected from each county represents the approximate proportions that were collected from each county for other years prior to 1936, and similar sums will be collected in the same proportion in the future unless prevented by the operation of the said State Statute. The cost to the Society of attempting to compile the lists and information required to be furnished under the State Statute would be far in excess of $300,000, which sum would have to be expended for research work with reference to the [fol. 343] past history of each and every copyright owner, by every one of the 44,000 members of the Society and its affiliated societies, lawyers fees for opinions as to the rights of parties, involved with respect to the ownership, grants, licenses and other interests in the respective copyrights, clerical help and other incidental expenses; even with such an expenditure, it would be utterly impossible to furnish an accurate or complete list of all the respective copyrights of the members of the Society and of its affiliated societies with all of the data required by the state statute."

* * * * * * *

(Paragraph 36, page 41, Complaint) "Each of the complainants has received from the Society for the year 1936, as compensation for the public performance for profit of the complainants' works, respectively, in excess of the following sums: Carl Fischer, Inc. in excess of $50,000.00; G. Schirmer, Inc. in excess of $50,000.00; Irving Berlin, Inc. in excess of $50,000.00; Gene Buck in excess of $5,000.00; Deems Taylor in excess of $5,000.00; Oley Speaks in excess of $5,000.00; William J. Hill in excess of $5,000.00; Anne

Paul Nevin in excess of $5,000.00; Ella Herbert Bartlett in excess of $5,000.00; and Jane Sousa in excess of $5,000.00; upon information and belief, complainants will be entitled to receive for the balance of the period for which they have entered into contracts with the Society, and for which the Society has contracts with users of music, similar amounts for each year, down to December 31, 1939, and such complainants will receive such amounts for said period if their right thereto is not interfered with and destroyed by such State Statute; approximately two-thirds of the revenue obtained by the Society and distributed to the complainants and others similarly situated, is derived from moneys paid for the right to perform publicly for profit by means of radio broadcasting, and if this Court does not interfere and restrain the enforcement of such State Statute, such revenue may be lost to the Society and the complainants and others similarly situated will not participate in royalties from the public performance for profit by means of radio broadcasting, because such performances, even though given in other parts of the United States, may, under the provisions of such State Statute, be deemed a violation of such State Statute in the State of Washington, and licenses made outside of the State of Washington may result in forfeiture by the State of Washington of all complainants' copyrights, and complainants will lose the benefit of their said contracts with the Society and all the contracts made between the Society and users of music, and will receive no further moneys from public performance for profit by means of radio broadcasting of their musical compositions. * * *"

[fol. 344] Except as to matters alleged upon information and belief, the verification of the Bill of Complaint by Gene Buck states that such complainant is fully familiar with the facts stated and avers them to be true.

Complainants, in part, pray that defendants:

* * * * * * *

"be enjoined and restrained by temporary and permanent order of injunction of this Court, from bringing, directly or indirectly, and from permitting to be brought, directly or indirectly, any proceeding at law or in equity for the purpose of enforcing said Statute, Chapter 218 of the Laws of 1937 of the State of Washington, against the complainants and others similarly situated, representatives, employees,

agents or any of them, including the Society, as and when said Statute goes into effect, and from taking any steps to create or act as an anti-monopoly board, and from demanding a list of copyrights of musical works from complainants and others similarly situated, and from attempting to appoint or take any steps leading to the appointment of a receiver, and from attempting to seize, escheat or confiscate copyrights and choses in action of complainants and others similarly situated, and from attempting to fix any fees or grant licenses on a per piece system or otherwise, on any of complainants' copyrighted musical works, and from attempting to collect any license fees on the copyrighted musical works of complainants and others similarly situated, and from interfering with all existing contracts entered into between complainants and others, including the Society and citizens and residents of the State of Washington, and from threatening to enforce against any citizens or residents of the State of Washington, the penalties of said Statute in the event such citizens and residents desire to carry out their contracts with Society or complainants and others similarly situated, and from taking any steps to declare an involuntary assignment of the copyrights of complainants and others similarly situated, and from filing lists thereof with the Register of Copyrights in Washington, D. C., and from prosecuting criminally the complainants, their representatives or agents, or any of them, or others similarly situated, for doing any act or thing to detect infringement and to enforce their respective rights under the Copyright Act in the Federal Courts of the State of Washington or elsewhere, and generally, from doing any act or thing to carry out or enforce any of the provisions of said State Statute as and when the same goes into effect; * * * "

* * * * * * *

[fol. 345] Filed with the Bill of Complaint were affidavits of the complainant Gene Buck, Walter S. Fischer, President of complainant Carl Fischer, Inc., Saul H. Bornstein, Treasurer of complainant Irving Berlin, Inc., Gustave Schirmer, Secretary of complainant G. Schirmer, Inc., and the individual complainants Anne Paul Nevin, Deems Taylor and Ella Herbert Bartlett. These affidavits, in addition to stating the nature, extent and value of the affiants' copyright interests, contain allegations regarding the difficulty and expense of complying with the provisions of the State statute. These

affidavits, while in certain respects more specific and detailed than the bill of complaint, insofar as the matter in controversy exceeding $3,000.00, exclusive of interest and costs, is concerned, offer nothing material in addition to the matter contained in the bill nor was there anything relevant upon this issue shown in the testimony taken upon the hearing.

This court was convened to hear the application of complainants for an interlocutory injunction. At the hearing of such application, motions of the defendants and intervening defendants to dismiss were also heard. Among the grounds enumerated in Defendants' motion to dismiss are the following:

"I.

That this case does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, in that the amount or value of the subject matter in dispute does not exceed the sum of three thousand dollars ($3,000.00), exclusive of interest and costs, and that in this regard, it, among other things, more particularly appears:

1. That the individual complainants are exempt from the operation of the act (Section 3—See Exhibit 'E', Bill of Complaint, page 75).

[fol. 346] 2. That the complainants, American Society of Composers, Authors and Publishers, is 'a voluntary, unincorporated, non-profit corporation' (Bill of Complaint, page 19) and will suffer no loss in complying with the act.

3. That complainants cannot aggregate the amounts in controversy in order to secure the requisite jurisdictional amount.

4. That the act (Section 4—Bill of Complaint, page 75) does not require any filing or license fee to be paid by complainants, or any of them."

* * * * * * *

IV.

"3. That complainants have a plain, speedy and adequate remedy at law, in that

(a) Complainants can adequately interpose a defense to any criminal proceeding brought under the act (Section

11—Bill of Complaint, page 81), and such right of defense is an adequate remedy at law; and

(b) That complainants can adequately interpose their defense in any injunction suit brought by any prosecutor under Section 9 of the act (Bill of Complaint, page 78), it being specifically provided in Section 10, Bill of Complaint, page 80, that no right of any person shall be affected in the state courts 'without full and complete due process of law'.

4. That defendants assert that they do not intend to enforce the criminal penalties of the act until the validity of the act is adjudged."

* * * * * * *

Complainants cite: Buck v. Elm Lodge, 83 F. (2d) 201 (C. C. A. 2); Simkins, Federal Practice (1934), Sec. 468; Green County vs. Thomas' Exr., 211 U. S. 598; Collings vs. Guarantee Trust Co., 10 F. Supp. 462; McNutt v. General Motors Acceptance Corp., 298 U. S. 178; KVOS, Inc. vs. Associated Press, 299 U. S. 269; State vs. Scollard, 126 Wash. 335; Connally vs. General Const. Co., 269 U. S. 385; Lawton vs. Steele, 152 U. S. 133, 136-137; Smith vs. Cahoon, 283 U. S. 553; Hartford S. B. I. & Ins. Co. vs. Harrison, 301 U. S. 459, 81 L. Ed. 857; Louis vs. Boynton, 53 Fed. (2d) 471; [fol. 347] Nutt vs. Ellerbee, 56 Fed. (2d) 1058; U. S. v. Bell Telephone Co., 167 U. S. 224, 249; Stevens vs. Gladding, 17 How. 451; Stevens vs. Cady, 14 How. 528; Ager vs. Murray, 105 U. S. 126; U. S. vs. Dubiller Condenser Corp., 289 U. S. 178, 186; Frost Trucking Co. v. Railway Comm., 271 U. S. 583 at 591; Stephenson vs. Binford, 287 U. S. 251, 275; Minnesota Rate Cases, 230 U. S. 352; Addyston Pipe & Steel Co. vs. U. S., 175 U. S. 211 at 227; Brennan vs. Titusville, 153 U. S. 302; Western Union Telegraph Co. vs. James, 162 U. S. 650 at 655; Southern Ry. Co. vs. Ry. Comm. of Ind., 236 U. S. 439; Prigg vs. Com. of Pa., 16 Pet. 539, 617; State ex rel. Foss Co. vs. Kelly, 186 Wash. 589; Van Dusen vs. Dept. of Labor & Industries, 186 Wash. 589; Patterson vs. Kentucky, 97 U. S. 501; Allen vs. Riley, 203 U. S. 347; Woods vs. Carl, 203 U. S. 358; Carbiee vs. Am. Patents Corp., 283 U. S. 27; Fox Film vs. Doyal, 286 U. S. 123; Straus vs. Am. Publ. Assn., 231 U. S. 222; State of Wash. vs. Am. Soc. C. A. & P., 13 F. Supp. 141; City of Des Moines vs. Des Moines City Ry., 214 U. S. 179; Speilman Motor Sales Co. vs. Dodge, 295 U. S. 89; Cincinnati vs. Traction Co., 245 U. S.

446; Henderson vs. Railroad Comm., 56 F. (2d) 218; Defiance Water Co. v. Defiance, 191 U. S. 184; Ferris vs. Frohman, 223 U. S. 424; Georgetown vs. Alexandria Canal, 12 Pet. 91; Healy v. Ratta, 292 U. S. 263; Pierce vs. Society, 268 U. S. 510; Carter v. Carter Coal Co., 298 U. S. 238; James v. Campbell, 104 U. S. 356 (1881) 358; Lithograph Co. v. Sarony, 111 U. S. 53, 59 (1884); American Tobacco Co. v. Werckmeister, 207 U. S. 284, 291 (1907); Caliga v. Inter Ocean Newspaper, 215 U. S. 182, 188 (1909); Rubber Tire Wheel Co. v. Milwaukee Rubber Co., 154 Fed. 358, 361; [fol. 348] Monongehela v. United States, 148 U. S. 312, 335; Story, Commentaries, Sec. 1152; 174th St. etc. Amusement Co. v. Maxwell, 169 N. Y. Supp. 895; Performing Rights Society, Ltd. v. Thompson, 34 T. L. R. 351; Performing Rights Soc. Ltd. v. Magistrates, 1922, S. C. 165; Performing Rights Soc. Ltd. v. London Theatre, L. R. (1924) A. C. 1; Buck v. Jewell-LaSalle, 283 U. S. 191; Society of European Stage Authors, Inc. v. N. Y. Statler Hotel, (S. D. N. Y., Apr. 30, 1937); M. Witmark & Sons v. Standard Music Roll Co., 221 Fed. 376, 379 (C. C. A. 3); Wheaton v. Peters, 8 Pet (33 U. S.) 591; Little v. Hall, 18 How. (59 U. S.) 165; Douglas v. Cunningham, 294 U. S. 207, 209 (1935); White-Smith Music Co. v. Appolo Co., 209 U. S. 1, 19; Globe Newspaper Co. v. Walker, 210 U. S. 356, 367; New Fiction Pub. Co. v. Star Co., 220 Fed. 994; Webb v. Powers, 2 Woodb. & M. 497, 29 Fed. Case No. 17,323; Napier v. Atlantic C. L. R. Co., 272 U. S. 605; N. P. Ry. Co. v. Cooney, Governor, 12 Fed. Supp. 73; Louisville & N. R. Co. vs. State, 76 So. (Ala.) 505; Erie R. Co. v. N. Y., 233 U. S. 671; N. P. Ry. Co. vs. Washington, 220 U. S. 370; So. Ry. Co. v. Railr. Com., 236 U. S. 434; New York C. R. Co. v. Winfield, 244 U. S. 148; Penn. R. Co. v. Pub. Service Commission, 250 U. S. 569; Panama R. R. Co. v. Johnson, 264 U. S. 375, 387; Southern Pacific Co. v. Jensen, 244 U. S. 207, 217; Coca Cola v. State, 225 S. W. 791; McCarthy v. White, 259 Fed. 364 (S. D. N. Y. 1919); Nutt v. National Institute Inc., 31 Fed. (2d) 236, 238 (1929 C. C. A. 2); Uproar Co. v. National Broadcasting Co., 8 Fed. Supp. 358, 362 (D. C. Mass. 1934) 81 Fed. (2d) 373; Walling v. Michigan, 116 U. S. 446, 454 (1886); Walton v. Missouri, 91 [fol. 349] U. S. 275 (1875); Bethlehem Motors Co. v. Flynt, 256 U. S. 421 (1921); Cramling v. Maxwell, 52 Fed. (2d) 256 (W. D. N. Car.); Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 511 (1935); Allgeyer v. Louisiana, 165 U. S. 578, 589; St.

Louis Compress Co. v. Arkansas, 260 U. S. 346, 348; New York Life Ins. Co. v. Head, 234 U. S. 149, 161; Home Ins. Co. v. Dick, 281 U. S. 397, 407; Aetna Life Ins. Co. v. Duncan, 266 U. S. 389, 399; Rawleigh v. Harper, 173 Wash. 233; Klabzuba v. Southern Pac. Co., 33 F. (2d) 359; Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U. S. 143, 149; Harrison v. St. Louis & San Francisco R. R., 232 U. S. 318; Chipman, Ltd. v. Jeffrey Co., 251 U. S. 373, 379; Cooper Manufacturing Co. v. Ferguson, 113 U. S. 727; Minnesota Commercial Men's Assn., 261 U. S. 140; Old Wayne Life Association v. McDonough, 204 U. S. 8; Peoples's Tobacco Co. v. American Tobacco Co., 246 U. S. 79; Green v. Chicago & Quincy Ry., 205 U. S. 530, 532; Fruit Industries Ltd. v. Metro, 18 F. Supp. 439; Parsons-Willis Lumber Co. v. Stuart, (C. C. A. 5th, 1910); 182 Fed. 779; James Dickinson Farm Mortgage Co. v. Harry, 273 U. S. 119, 122; Caledonian Coal Co. v. Baker, 196 U. S. 432, 444; Bank of America v. Whitney Central National Bank, 261 U. S. 171; Manley v. Georgia, 279 U. S. 1, 6; Heiner v. Donnan, 285 U. S. 312, 318; Morrison v. California, 291 U. S. 82, 90; Cline v. Frink Dairy Co., 274 U. S. 455, 457; H. Earl Clack Co. v. Public Service Com., 94 Mont. 488, 501, 22 Pac. (2d) 1056; United States v. Cohen Grocery Co., 255 U. S. 81, 89; A. B. Small Company v. American Sugar Ref. Co., 267 U. S. 233, 239 and 240; Ex Parte Young, 209 U. S. 123, 147, 148; State v. Crawford, 74 Wash. 248; Connolly v. Union [fol. 350] Sewer Pipe Co., 184 U. S. 540 (1902) 562; State v. Cudahy P. Co., 33 Mont. 179; Seattle v. Ford, 144 Wash. 107; Inmin v. Sandvig, 170 Wash. 112; Kaufman v. West, 133 Wash. 192; Corn v. Fort, (Tenn.) 95 S. W. (2d) 620 (1936); Aberdeen S. & L. Assn. v. Chase, 157 Wash. 351, 392; Burr v. Chase, 157 Wash. 393; Dobbins v. Los Angeles, 195 U. S. 223, 240; McFarland v. American Sugar Co., 241 U. S. 79, 86; Wrthen Co. v. Kavanaugh, 295 U. S. 56 (1935) 60, 62; Fisher v. Kittinger, 39 Wash. 174; Tyson v. Banton, 273 U. S. 418, 429 (1927) 430, 441; Wolff Co. v. Industrial Court, 262 U. S. 522; Adams v. Tanner, 244 U. S. 590; Ribnik v. McBride, 277 U. S. 350; New State Ice Co. v. Liebman, 285 U. S. 262; Paul v. Virginia, 8 Wall. 168; Terral v. Burke Construction Co., 257 U. S. 529, 532; Missouri Pacific Ry. Co. v. Larabee, 234 U. S. 459; Williams v. Standard Oil Co., 278 U. S. 235, 243; Carter v. Carter Coal Co., 298 U. S. 238, 316; Railroad Board v. Alton R. Co., 295 U. S. 330, 362; Metro-Goldwyn-Mayer Distributing Corporation v. Lamb,

D. C., New Mexico, 1933; United States v. Interstate Circuit, Inc., 20 F. Supp. 868; Bobbs-Merrill Co. v. Straus, 210 U. S. 339; United States v. General Electric Co., 272 U. S. 476 at 485; American Banana Co. v. United Fruit Co., 213 U. S. 347; Title 15, U. S. C. A., Sec. 11; Buck v. Harry R. Swanson, No. 562, Equity, U. S. District Court for the District of Nebraska, Lincoln Division; Henneford v. Northern Pacific Ry., 82 L. Ed. 443; Troy Bank v. Whitehead & Co., 222 U. S. 39 (1911); Local Union No. 497 v. Joplin & P. Ry. Co., 287 Fed. 473 (C. C. A. 8, 1923); Haynes v. Fraternal Aid Union, 34 F. (2d) 305; Shields v. Thomas, 17 How. 3 (1854); Rodd v. Heartt, 17 Wall. 354, 357 (1873).

[fol. 351] Defendants cite: Simkins Federal Practice (1934) Sections 386, 395-9; Pennsylvania v. Williams, 294 U. S. 176; Gordon v. Washington, 295 U. S. 30; Woods v. First National Bank, 16 F. (2d) 856 (C. C. A. 9th); Judicial Code, Section 37, 28 U. S. C., Section 80; Simkins Federal Practice (1934), Sections 483; 446, 462; McNutt v. General Motors Acceptance Corp., 298 U. S. 178; Simkins Federal Practice (1934), Sections 439, 444, 487; Matthews v. Rogers, 284 U. S. 521, 524, 525; Pusey & J. Company v. Hanssen, 261 U. S. 491, 500; American Mutual Liability Insurance Company v. McDonough, 61 F. (2d) 558, certiorari denied, 288 U. S. 602; KVOS v. Associated Press, 299 U. S. 269, 57 S. Ct. 197; Simkins Federal Practice (1934), Sec. 652; Missouri P. R. Co. v. Norwood, 283 U. S. 249; Allen v. Riley, 203 U. S. 347; Patterson v. Kentucky, 97 U. S. 501; John Woods & Sons v. Carl, 203 U. S. 358; Ozan Lumber Co. v. Union Nat'l Bank, 207 U. S. 251; Carbide Corp. v. American Patents Corp., 283 U. S. 27, 33; foot-note; Fox Film Corp. v. Doyal, 286 U. S. 123; Straus v. American Publishers Ass'n., 231 U. S. 222; State v. A. S. C. A. P., 13 F. Supp. 141; Heald v. District of Columbia, 259 U. S. 114; Arizona Copper Co. v. Hammer, 250 U. S. 400; Walker v. Gish, 269 U. S. 447; Lehon v. Atlanta, 242 U. S. 53; Oliver Iron Mining Co. v. Lord, 262 U. S. 172; Simkins Federal Practice (1934), Sec. 458, p. 401, and cases cited; Dahnke-Walker Co. v. Bondurant, 257 U. S. 283, 289; Panama R. Co. v. Johnson, 289 Fed. 964, affirmed 264 U. S. 374; Blair v. United States, 250 U. S. 273, 279; Massachusetts v. Mellon, 262 U. S. 447, 488; Dewar v. Brooks, 16 F. Supp. 636, 638, 9; Healy v. Ratta, 292 U. S. 263; Hale v. Mann, 15 Fed. (2d) 1051, 1052; Wheless v. City [fol. 352] of St. Louis, 180 U. S. 379 at 393; Eberhard v.

Northwestern Mutual Life Ins. Co., 241 Fed. 353; Chapter 34 of the Laws of 1909 of the State of New York, as amended by Chapter 915, Laws of 1930 and Chapter 609 of the Laws of 1932; Spielman Motor Sales Co. v. Dodge, 295 U. S. 678; Cincinnati v. Traction Co., 245 U. S. 446; Henderson v. Railroad Commission, 56 Fed (2d) 218; Des Moines v. Railway, 214 U. S. 179; Defiance Water Co. v. Defiance, 191 U. S. 184; Savannah v. Hilton, 51 S. E. 744; Columbia Building Co. v. Grange, 77 Fed. 798; Boise Artesian Water Co. v. Boise City, 213 U. S. 276; Texas Co. v. Grosjean, 16 Fed. Supp. 264; Cruickshank v. Bidwell, 176 U. S. 73; Indiana Mfg. Co. v. Koehne, 188 U. S. 681; Atlantic Pipe Line Co. v. State Tax Board, 12 F. Supp. 265; Western Union Telegraph Co. v. Georgia, 269 U. S. 67; Cavanaugh v. Looney, 248 U. S. 450; Pullman Co. v. Tamble, 173 Fed. 200; City of St. Augustine v. St. James Electric Co., 286 Fed. 474; Columbus Ry. etc. Co. v. City of Columbus, 253 Fed. 499; Associated Press v. Herrick, 13 F. Supp. 897; Union Sulphur Co. v. Reed, 249 Fed. 172; Argonaut Mining Co. v. McPike, 78 F. (2d) 584; Ryan v. Amazon Petroleum Corp., 71 F. (2d) 1; Davis v. Farnum Mfg. Co., 189 U. S. 207; Dartmouth Woolen Mills v. Myers, 16 F. Supp. 633; Amalgamated Oil Gas Corp. v. San Francisco, 263 Fed. 617; Securities Exchange Comm. v. Electric Bond and Share, 18 F. Supp. 131; Bristol Myer Co. v. Tischauer, 18 F. Supp. 228; Fitts v. McGhee, 172 U. S. 516; Richmond Hosiery Mills v. Camp, 74 F. (2d) 200; McCormack Bros. Co. v. City of Tacoma, 201 Fed. 374; Clark v. Lindemann & Hoverson Co. 88 F. (2d) 59; Northport Power & Light Co. v. Hartley, 283 [fol. 353] U. S. 568, 570; Simkins, Federal Practice (1934) Sec. 735; National Fire Ins. Co. vs. Thompson, 281 U. S. 331; Meccano, Ltd. v. John Wanamaker, 253 U. S. 136, 141; Chicago, Great Western Ry. vs. Kentall, 266 U. S. 94, 100; Rend vs. Ventura Oil Co., 48 Fed. 248; Spark vs. Hart Coal Corp., 74 F. (2d) 697, 699; Jamestown Veneer & P. Corp. v. Boland, 15 F. Supp. 28; Sparks vs. Mellwood Dairy, 74 F. (2d) 695; Behre v. Anchor Ins. Co., 297 Fed. 986; Phoenix R. R. vs. Geary, 239 U. S. 277; Yarnell vs. Hillsborough P. Co., 70 F. (2d) 435; Article I, Section 8, Federal Constitution; Title 17, U. S. Code, Sections 42, and 44; New Fiction Publishing Company v. Star Company, 220 F. 994,; Article XII, Section 22, Constitution of the State of Washington; American Export Door Corp. v. Gauger, 154 Wash. 514; Kuhn v. Fair-

mont Coal Co., 215 U. S. 349; Simkins Federal Practice (1934), Sec. 337; Grant-Smith Porter Ship Co. v. Rohde, 25 U. S. 469; Millers Indemnity Co. v. Brand, 270 U. S. 59; Union Bank & Trust Co. v. Phelps, 288 U. S. 181; Carley & Hamilton v. Snook, 281 U. S. 66; Hart Refineries v. Harmon, 278 U. S. 499, 574; Smith v. Cahoon, 283 U. S. 553; State Board v. Jackson, 283 U. S. 527; Village of Euclid v. Ambler, 272 U. S. 365; Baldwin Case, 294 U. S. 511; Henneford v. Mason Co., 300 U. S. 577; Hyland Farms v. Agnew, 300 U. S. 308; Union Dry Goods Co. v. Georgia Public Service Corp., 248 U. S. 372; Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398, 434-5; Manigaul v. Sprins, 199 U. S. 473, 480; Terral v. Burke Construction Co., 257 U. S. 529; Paul v. Virginia, 8 Wall. 168; Hooper v. California, 155 U. S. 648; Moore v. New York Cotton Exchange, 270 U. S. 593; Savage v. Jones, 225 U. S. 501; Continental Wallpaper Co. v. Voight [fol. 354] & Sons, 212 U. S. 227; Ludeling v. Chaffe, 143 U. S. 301; Giles v. Little, 134 U. S. 645, 649; McCandless v. Pratt, 211 U. S. 437; Dahnke v. Walker Milling Co. v. Bondurant, 257 U. S. 282, 289; Hale v. Mann, 15 Fed. Supp. 1051; Pinel v. Pinel, 240 U. S. 594; Hart Coal Corporation v. Sparks, 9 F. Supp. 825; Clay v. Field, 138 U. S. 464, 479; Lion Bonding & Surety Company v. Karatz, 262 U. S. 77; Harvey v. Raleigh & G. R. Co. et al., 89 Fed. 115; Healy vs. Ratta, 292 U. S. 263.

Intervening Defendant KMO, Inc., cites: Pennsylvania v. Williams, 294 U. S. 176; Gordon v. Washington, 294 U. S. 30; Woods v. First National Bank, 16 F. (2d) 856; Grael v. United Electric Co., 132 Fed. 252, 265; Harley v. Fireman's Fund Insurance Co., 245 F. 471; Demer v. Pacific SS. Co., 273 Fed. 567, 577; Hansen v. Pacific Coast Cement Co., 243 Fed. 285; Eddy v. Chicago & N. W. R. Co., 226 Fed. 120, 125; Ex Parte Poresky, 290 U. S. 30; Patterson v. Kentucky, 97 U. S. 501; Allen v. Riley, 203 U. S. 347; John Woods & Sons v. Carl, 203 U. S. 358; Ozan Lumber Co. v. Union County Nat'l Bank, 207 U. S. 251; Carbide Corp. v. American Patents Dev. Co., 283 U. S. 27, 33, footnote; Fox Film Corp. v. Doyal, 286 U. S. 123; Straus v. American Publish. Assn., 231 U. S. 222, 234-5; State v. A. S. C. A. P., 13 F. Supp. 141; Heald v. District of Columbia, 259 U. S. 114; Arizona Copper Co. v. Hammer, 250 U. S. 400; Walker v. Gish, 260 U. S. 447; Lehon v. Atlanta, 242 U. S. 53; Oliver Iron Mining Co. v. Lord, 262 U. S.

172; Panama R. Co. v. Johnson, 289 Fed. 964, affirmed, 264 U. S. 374; Yazoo & Miss. R. Co. v. Jackson Vinegar Co., 226 U. S. 217; Blair v. United States, 250 U. S. 273, 279; [fol. 355] Massachusetts v. Mellon, 262 U. S. 447, 488; McNutt v. General Motors Acceptance Corp., 298 U. S. 178; KVOS v. Associated Press, Inc., 299 U. S. 269, 57 S. Ct. 197; Columbia Building and Loan v. Grange, 77 Fed. 798; Wheless v. City of St. Louis, 180 U. S. 379 at 383; Dewar v. Brooks, 16 F. Supp. 636; Scribner v. Straus, 210 U. S. 352; Spielman Motor Sales Co. v. Dodge, 295 U. S. 678; Cincinnati v. Traction Co., 245 U. S. 446; Henderson v. Railroad Commission, 56 Fed. (2d) 218; Savannah v. Hilton, 51 S. E. 744; Boise Artesian Water Co. v. Boise, 213 U. S. 276; Texas Co. v. Grosjean, 16 F. Supp. 264; Cruickshank v. Bidwell, 176 U. S. 73; Indiana Mfg. Co. v. Koehne, 188 U. S. 681; Atlantic Pipe Line Co. v. State Board, 12 Fed. Supp. 265; Western Union Telegraph Co. v. Georgia, 269 U. S. 67; Cavanaugh v. Looney, 248 U. S. 450; Pullman Co. v. Tamble, 173 Fed. 200; Columbus Ry. etc. Co. v. City of Columbus, 253 Fed. 499; Associated Press v. Herrick, 13 F. Supp. 897; Union Sulphur Co. v. Reed, 249 Fed. 172; Argonaut Mining Co. v. McPike, 78 F. (2d) 584; Ryan v. Amazon Petroleum Corp., 71 F. (2d) 1; Davis v. Farnum Mfg. Co., 189 U. S. 207; Dartmouth Woolen Mills v. Myers, 16 F. Supp. 633; Securities Exchange Comm. v. Electric Bond & Share, 18 F. Supp. 131; Bristol Myer Co. v. Tischauer, 18 F. Supp. 228; Fitts v. McGhee, 172 U. S. 516; Richmond Hosiery Mills v. Camp, 74 F. (2d) 200; McCormick Bros. Co. v. City of Tacoma, 201 Fed. 374; Clark v. Lindemann & Hoverson Co., 88 F. (2d) 59; Mathews v. Rodgers, 284 U. S. 521, 529, 530; Simkins Federal Practice (1934) Sec. 735; National Fire Ins. Co. v. Thompson, 281 U. S. 331; Rend v. Ventura Oil Co., 48 Fed. 248; Jamestown Veneer & P. Corp. v. Boland, 15 Fed. [fol. 356] Supp. 28; Sparks v. Mellwood Dairy, 74 F. (2d) 695; Behre v. Anchor Ins. Co., 297 Fed. 986; Phoenix R. R. v. Geary, 239 U. S. 277; Yarnell vs. Hillsborough P. Co., 70 F. (2d) 435; American Society of Composers, Authors and Publishers vs. Elm Lodge, May 12, 1936, J. Bryant, District Court of New York; Caliga vs. Newspaper Co., 215 U. S. 188; United States v. Knight, 136 U. S. 1; U. S. National Bank v. Main, 284 U. S. 331; Palmer v. Texas, 212 U. S. 119; Article XII, Sec. 22 of the Washington Con-

stitution; Ager v. Murray, 105 U. S. 126; State v. Morey, 195 Pac. 501; National Harrow Co. v. Hendh, 83 Fed. 36; Maloney, Attorney General v. American Tobacco Co., 72 Fed. 801; Hoit vs. Bates, 81 Fed. 641; Carle Laemmle Music Co. vs. Stern, 209 Fed. 129; Murphy v. Johnson, 49 Fed. (2d) 410; Blytheville Ry. Co. vs. St. Louis San Francisco Ry. Co., 33 Fed. (2d) 481; Von Herberg vs. City of Seattle, 27 Fed. (2d) 457; Georgia Trust Co. vs. State of Georgia, 109 Ga. 766; 35, S. E. 323; 40 Corpus Juris 198; State vs. Racina, 63 Civ. Appeals 663, 134 S. W. 400; 41 Corpus Juris 127; Howard vs. Fleming, 191 U. S. 126; Ughbanks vs. Armstrong, 208 U. S. 481; Randall v. Brigham, 74 U. S. 523; In re Jordan, 49 Fed. 238; Germania Insurance Co. v. Wisconsin, 119 U. S. 473; Pullman Palace Car Company v. Speck, 113 U. S. 84; Schipper v. Consumer Cordage Co., 73 Fed. 803; Kansas City Railroad v. Daughtry, 138 U. S. 298; Associated Press v. National Labor Relations Board, 301 U. S. 103; West Coast Hotel Co. v. Parrish, 300 U. S. 379; Hobbie vs. Jennison, 149 U. S. 355, 13 Sup. Ct. Rep. 879; 37 L. Ed. 766; Adams v. Burke, 17 Wallace 453; Boesch v. Graff, 133 U. S. 697, 10 Sup. Ct. Rep. 378; Buck v. Jewell-[fol. 357] L[illegible]alle, 283 U. S. 191, 51 Sup. Ct. Rep. 412; Billiard Table Manufacturing Co. v. Tyler Bunk, 16 Fed. Supp. 990; Bass vs. State Tax Commission, 133 N. E. 122, 232 N. Y. 42; Highland Farms Dairy v. Agnew, 300 U. S. 608; Henneford v. Silas Mason Co., 300 U. S. 577; New York ex rel Cohn v. Graves, 300 U. S. 308; Campbell vs. Haverhill, 155 U. S. 610, 39 L. Ed. 280; 15 Sup. Ct. 217; Maloney, Attorney General of Illinois vs. American Tobacco Co., 221 U. S. 106; McKenny vs. Kansas Natural Gas Co., 206 Fed. 772; Clark on Receivers, Vol. I, Sec. 243, p. 332; United States vs. Union Pacific Railway, 226 U. S. 98; Carpenter vs. Strange, 141 U. S. 87, 105; First National Bank vs. Maine, 284 U. S. 312; York vs. Texas, 137 U. S. 15, 11 Sup. Ct. 9; Kauffman vs. Wooters, 138 U. S. 285, 11 Sup. Ct. 298; State vs. Racine, 63 Texas Court of Appeals, 663, 134 S. W. 400; 41 Corpus Juri 127; Manners v. Morosco, 258 Fed. 357, affirmed 2522 U. S. 317; Drone on Copyright, p. 337; Hossak v. Ottawa Association, 91 N. E. 439; Brown v. Harris Medical Society, 194 S. W. 1179; Kelsey vs. Grain Elevator, 206 S. W. 849; Dale Tile Mfg. Co. vs. Hayatt, 125 U. S. 46; Witteman Bros. v. Wit-

teman Co., 151 N. Y. S. 814; New Marshall Engine Co. vs. Marshall Co., 223 U. S. 473; Montgomery Palace Stock Car Co. v. Car Line, 43 Fed. 321; Hartell v. Tilchman, 99 U. S. 547; Albright v. Teas, 106 U. S. 613; Becker v. Contoure Laboratories, 29 Fed. (2d) 31; Bouvier's Law Dictionary, "Assignment", page 264, Vol. I; Title 28, U. S. C. A., Notes 221 to 260, pages 108 to 122; DeCroisset et al. v. Vitagraph Co., 262 Fed. 100; Tulley v. Triangle Film Corp., 229 Fed. 297; KVOS Inc. v. Associated Press, 299 U. S. 269; Decision of Judge Augustus Hand, filed Feb-[fol. 358] ruary 27, 1922, in United States v. Consolidated Music Corporation, U. S. District Court for the Southern District of New York; Parson v. Chicago, 138 Fed. 184, 186; Chicago etc. R. R. Co. v. Wiggins, 108 U. S. 18, 1 S. Ct. 614, 27 L. Ed. 636; Boise Artesian Hot and Cold Water Co. v. Boise City, 213 U. S. 276, 53 L. Ed. 796; Rogers v. Matthews, 284 U. S. 521, 76 L. Ed. 447; Title 28, U. S. C. A., Sec. 384; Spielman Motor Sales Co. Inc. v. Dodge, 295 U. S. 89, 76 L. Ed. 1322; Bradford v. Hurd, 84 Fed. (2d) 722; Cleveland Cliffs Iron Co. v. Kinney, 262 Fed. 980; Riggs v. Johnson, 6 Wall. 166, 18 L. Ed. 768; Phelps v. Mutual Reserve Fund Life Assoc., 190 U. S. 147, 23 S. Ct. 707, 47 L. Ed. 987; Fisk v. Union Pac. R. Co., Fed. Cas. No. 4827; Smyth v. Asphalt Belt Ry. Co., 267 U. S. 326; 45 S. Ct. 242, 69 L. Ed. 629; Northport Power and Light Company v. Hartley, 283 U. S. 568, 75 L. Ed. 1275; Heald vs. Dist. of Columbia, 259 U. S. 114; Arizona Copper Co. v. Hammer, 250 U. S. 400; United States v. Interstate Circuit, Inc., 20 F. Supp. 868; Buck vs. DeBaum, 40 Fed. (2d) 734; Legislative Bill No. 478, Fifty-Second Session, Legislature of Nebraska; Henneford v. Northern Pacific, Montgomery's Manual, P. 161; Risty v. Chicago, R. I. & P. Ry. Co., 297 Fed. 710-722; Chicago, R. I. & P. Ry. Co. v. Risty, 282 Fed. 364, cert. denied, 266 U. S. 622.

Intervening Defendant John J. Lockhart cites: Love v. Kozy Theatre, 236 S. W. 245; Continental Co. v. Voight, 212 U. S. 227; Title 15, U. S. C. A., Sec. 17; Fisher's Blend Station v. Washington Tax Commission, 297 U. S. 650; Straus v. American Book Publishers, 231 U. S. 231; National Harrow v. Hench, 83 Fed. 36; Goldwyn Pictures vs. Howells, 282 Fed. 9; Corpus Juris, Vol. 13, p. 1106; Photo-[fol. 359] Drama et al. vs. Social Uplift Film Co., 213 Fed. 374; Witmark v. Pastime Theatre, 298 Fed. 470; New Fic-

tion Pub. Co. v. Star Co., 220 Fed. 994; Bobbs-Merrill Co. v. Straus; 147 Fed. 15; Federal Baseball League vs. National League, 259 U. S. 200; Marienelia Limited v. United Booking Offices, 227 Fed. 165; United States v. Patten, 226 U. S. 543; Leewe v. Lawlor, 208 U. S. 274; Paramount v. United States, 282 U. S. 30; United States v. Northern Securities, 120 Fed. 721; Standard Oil vs. United States, 283 U. S. 163; Eastern States Retail Association v. United States, 243 U. S. 600; United States v. American Column Lumber Co., 263 Fed. 147, affirmed 257 U. S. 377; Northern Securities vs. United States, 193 U. S. 197; Addyston Pipe Co. vs. United States, 85 Fed. 291.

CUSHMAN, District Judge:

Section 266 of the Judicial Code (Title 28, U. S. C. A., § 380), in part, provides:

* * * * * * *

"It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State."

* * * * * * *

As already stated, the prayer of the Complaint, in part, is that defendants:

* * * * * * *

"be enjoined and restrained by temporary and permanent order of injunction of this court, from bringing, directly or indirectly, and from permitting to be brought, directly or indirectly, any proceeding at law or in equity for the purpose of enforcing said Statute, Chapter 218 of the laws of 1937 of the State of Washington, against the complainants [fol. 360] and others similarly situated, representatives, employees, agents or any of them, including the Society, as and when said Statute goes into effect. * * *"

By the foregoing it appears that a, if not the, major purpose of the Bill is to deprive the State courts of an oppor-

tunity to exercise the jurisdiction saved to them by the express terms of the Act under which this court was created and under which complainants ask it to enjoin defendants from bringing such authorized suits in a court of the State.

In view of the conclusion herein reached it will not be determined whether, under such circumstances, the court should attempt to spell out jurisdiction of other parts of this suit.

As already stated, each one of the defendants, in the motion to dismiss, state:

* * * * * * * *

"4. That defendants assert that they do not intend to enforce the criminal penalties of the act until the validity of the act is adjudged."

* * * * * * * *

The consideration of the effect of this disclaimer upon the jurisdiction of the Court as a court of equity (Spielman Motor Co. v. Dodge, 295 U. S. 89-96) should in any event be deferred until the court determines its jurisdiction as a district court.

The Bill must allege affirmatively and distinctly whatever is essential to the Court's jurisdiction, Smith v. McCullough, 270 U. S. 456-459; Norton v. Larney, 266 U. S. 511-515, and, if the allegations of the Bill as to jurisdictional facts are by the defendants challenged in an appropriate manner, complainants must support them "by competent proof", McNutt v. General Motors Acceptance Corp., 298 U. S. 178-189

[fol. 361] There is no question but that the motion of the defendants to dismiss, denying that the matter in controversy exceeds $3,000.00 exclusive of interest and costs, was sufficient at the hearing had to place upon complainants the burden of so establishing that it is in excess of such amount.

The Bill of Complaint alleges that Chapter 218 is unconstitutional:

* * * * * * * *

", in that it deprives complainants of their liberty and property without due process of law and the equal protection of the laws; impairs the obligation of contract, destroys the rights of complainants in their copyrighted works, nullifies valid contracts theretofore entered into, interferes with the

Federal judicial power, destroys the privileges and immunities granted to complainants, and attempts to subordinate the Federal Constitution and the Copyright Act to the State of Washington, and complainants to an unreasonable search and seizure of their properties, effects, papers and persons."

. . . . . .

By the foregoing it is made to appear that complainants invoke the protection of the 14th Amendment, Article I, Section 8, Clause 8, Section 10, Clause 1, Article 3, Section 2, Clause 1, Article 4, Section 2 and Article 6, Clause 2 of the Constitution.

The suit, as made by the Bill, is one concerning a State legislative enactment affecting property in copyrights because of conduct of those owning and interested in them—conduct beyond and apart from rights granted by copyrights. The owner of a copyright, because of conduct prohibited by law, may lose it. The question is whether the conduct by this statute forbidden is within the police power of the State to proscribe.

It follows that the suit is one under the Fourteenth [fol. 362] Amendment rather than one arising under the copyright laws of the United States and that the amount in controversy to give the court jurisdiction must be in excess of $3,000.00, exclusive of interest and costs.

The non-profit sharing complainant Society, on behalf of whose members it is claimed the Bill is filed, has not the requisite amount of pecuniary interest. KVOS, Inc. v. Associated Press, 299 U. S. 269-278. The transfer to the Society by the members of their rights for such of the total (less expense) realized from the pooled license fees as a committee of the Society shall determine does not affect the pecuniary interest of the Society.

Concerning the aggregating of the claims of the members of the complainant Society in determining the amount in controversy, neither practice nor rule of the committee concerning the apportioning among the Society's members of the pooled license fees realized is shown. It appears to be a part of the contention made by the defendants that such division is inequitable and to the advantage of those directly concerned with the management of the affairs of the Society. It also appears that such distribution may be of license fees secured throughout the country rather than from

within the State. A common interest among the members warranting an aggregating of their claims for such purpose has not been shown.

Concerning the competency of the verified Bill and affidavits, Equity Rules 73 and 48 provide:

"Rule 73. Preliminary Injunctions and Temporary Restraining Orders.

[fol. 363] No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall clearly appear from the specific facts, shown by affidavit or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency specified, the matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of the order, and shall take precedence of all matters, except older matters of the same character. When the matter comes up for hearing the party who obtained the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the court shall dissolve his temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order, the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require. Every temporary restraining order shall be forthwith filed in the clerk's office."

"Rule 48. Testimony of Expert Witnesses in Patent and Trade Mark Cases.

In a case involving the validity of scope of a patent or trade-mark, the district court may, upon petition, order that the testimony in chief of expert witnesses, whose testimony is directed to matters of opinion, be set forth in affidavits and filed as follows: Those of the plaintiff within forty days after the cause is at issue; those of the defendant within twenty days after plaintiff's time has expired; and rebutting affidavits within fifteen days after the expiration of the time for filing original affidavits. Should the

opposite party desire the production of any affiant for cross-examination, the court or judge shall, on motion, direct that said cross-examination and any re-examination take place before the court upon the trial, and unless the affiant is produced and submits to cross-examination in compliance with such direction, his affidavits shall not be used as evidence in the cause."

Rule 29 of the Rules of this—the District—Court, provides:

"Rule 29. Injunctions.

Proceedings for injunctions are governed by the practice in equity in the Federal Courts. No application for a preliminary injunction or restraining order will be enter-
[fol. 364] tained, by the Court or Judge, until after a bill in equity has been filed in the clerk's office and a subpoena issued thereon. No preliminary injunction shall be granted without notice to the opposite party; nor shall any temporary restraining order be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that irreparable injury will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency above specified, the matter shall be made returnable on the earliest day that the business of the Court will admit of, and if practicable, not later than the succeeding law and motion day, which is to be held, and shall take precedence of all other matters on the calendar of said day, except older matters of the same character, and matters to which special precedence may be given by the order of the Court. When the matter first comes up for hearing the party who obtained the temporary restraining order shall be required to be ready to proceed with his application for a preliminary injunction, and if he be not ready the Court may dissolve his temporary restraining order. The defendant, however, shall be entitled as of course to one continuance for a reasonable period, if he desires it, to enable him to meet the application for the preliminary injunction. The defendant may, without notice, when the matter first comes up in court, or at any subsequent hearing, present affidavits relating to the continuance or modification of the temporary restraining order as distinct from the application for the

injunction, and the restraining order may be dealt with separately in the discretion of the Court."

* * * * * * * *

No temporary restraining order was granted in this cause. Rule 48, in effect, excepts the cases therein described from the general rule. Rule 73 and Rule 48 are both new rules promulgated since the adoption of Rule 29 of this Court. Rule 29 is not at variance with Rule 73. If it was, Rule 73 would of course control.

In view of the foregoing, it is clear that there is no competent evidence showing that the matter in controversy exceeds, exclusive of interest and costs, $3,000.00. See also [fol. 365] Title 28, U. S. C. A., §§§§ 381, 639, 723 and 730.

The affidavits in support of the Bill may, upon such a hearing, be considered as preliminary pleadings for the purpose of determining what, if any, matters are in dispute, but they and the verified Bill are, if denied, incompetent as evidence.

If the competency of the allegations of the Bill and affidavits be assumed, they still fail to clearly and distinctly show that the jurisdictional amount is in controversy, for while the owners of copyrights may be assumed to have knowledge concerning the extent of their ownership, there can be no presumption that they are qualified to express an opinion concerning the cost of complying with the requirements of Section 4 of the Act, nor would the Court, without more, be warranted in accepting, without opportunity for cross-examination, the statement of an owner as to the value of his property unless it was a statement against interest.

As already shown (by the quoted prayer of the Complainants) this suit was brought before the statute went into effect. Consequently no penalties could have been incurred under the act at the time of the institution of the suit. See Healy v. Ratta, 292 U. S. 263-268.

The injunction prayed will be denied and defendants' motion to dismiss, as not within the jurisdiction of the Court, will be granted.

If additional orders or rulings are desired, motions therefor may be noted for hearing at the settlement of orders based upon the foregoing ruling, which will also be upon notice.

[fol. 366] The Clerk is directed to notify the attorneys for the parties of the filing of this decision.

Bert Emory Haney, Circuit Judge. Edward E. Cushman, District Judge. John C. Bowen, District Judge.

[fol. 367] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF LOUIS D. FROHLICH—Filed May 17, 1938

Louis D. Frohlich, being duly sworn, deposes and says:

I am an attorney at law with an office to practice law in the City and State of New York, and I am of counsel for the complainants herein.

I have read the opinion of this Court filed May 9, 1938, and make this application pursuant to that part of the opinion which reads as follows:

"If additional orders or rulings are desired, motions therefor may be noted for hearing at the settlement of orders based upon the foregoing ruling, which will also be upon notice."

[fol. 368] This application is to take oral testimony of witnesses, whose names are hereinafter set forth, with an opportunity to defendants to cross-examine such witnesses on the question of the value of the matter in controversy herein, and on such other questions as this Court may permit or direct oral testimony to be taken.

In May, 1937, this action was commenced to declare unconstitutional and to restrain the enforcement of the Statute enacted in 1937 by the Legislature of the State of Washington, known as Chapter 218 of the Laws of 1937 of the State of Washington.

This statutory Court was thereafter convened and a motion made for temporary injunction.

This motion came on to be heard before this Court in Tacoma, Washington on June 29, 1937, at which time cer-

tain parties applied for and obtained permission to intervene as co-defendants herein.

Counsel for complainants argued in support of the application for temporary injunction. Counsel for the defendants and the intervenors argued in opposition thereto. Defendants brought up at the same time a motion to dismiss the complaint.

The only oral testimony taken on the motion was that of the witness Burt F. Fisher and of the witness E. Claude Mills, who were examined on direct by respective counsel for the complainants herein.

Neither of the witnesses testified with respect to the value of the matter in controversy.

[fol. 369] The opinion of this Court filed on May 9, 1938 states:

"The Bill must allege affirmatively and distinctly whatever is essential to the Court's jurisdiction, Smith v. McCullough, 270 U. S. 456-459; Norton v. Larney, 266 U. S. 511-515, and, in the allegations of the Bill as to jurisdictional facts are by the defendants challenged in an appropriate manner, complainants must support them 'by competent proof', McNutt v. General Motors Acceptance Corp., 298 U. S. 178-189.

"There is no question but that the motion of the defendants to dismiss, denying that the matter in controversy exceeds $3,000.00 exclusive of interest and costs, was sufficient at the hearing had to place upon complainants the burden of so establishing that it is in excess of such amount."

Upon the argument of the motion, the complainants offered no proof as to the jurisdictional amount because there was no denial of any of the facts pleaded. It was our belief that a motion to dismiss admits rather than denies all facts well pleaded.

We realize, however, that under the doctrine of McNutt v. General Motors, etc. Corp., 298 U. S. 178, 184, the court may of its own motion, if led to believe that its jurisdiction is not properly invoked, "inquire into the facts as they really exist".

The opinion of this Court indicates that it does not believe that jurisdiction was properly invoked, and we desire to be afforded the opportunity to present the facts as they really exist, and in such a manner as will permit the most

searching cross-examination, whether in the presence of the Court or by deposition, as this Court may direct.

We should like to offer evidence to explain the manner of the Society's operation and to show, as we believe beyond [fol. 370] any peradventure, that all the members of the Society who are before this Court in a representative capacity have a joint interest in the $59,000 which the Society receives annually from licensing users in the State of Washington.

We desire to show by reference to the Articles of Association, to the contracts between the Society and its members, and between the Society and users in the State of Washington, and by the oral testimony of the complainants and other members of the Society, that all the members have a common interest in the amounts collected from users in the State of Washington.

We did not understand Equity Rules 73 and 48 and Rule 29 of the Rules of this Court to require such oral testimony. In view of the Court's ruling, however, we desire an opportunity to present the same.

Since this Court has ruled that the complaint and verified affidavits are incompetent as evidence (opinion, p. 34), we desire to offer competent oral evidence to support all the allegations and statements therein made.

We desire to offer the testimony of expert witnesses concerning the cost of complying with the requirements of Section 4 of the Act, and concerning the value of the property rights in question which will be affected by this Statute.

In order to establish the jurisdiction of this Court in this case, we desire to produce for purposes of examination and cross-examination in the presence of this Court, or by deposition, as this Court may direct, the following wit- [fol. 371] nesses:

Gene Buck	Residing at Great Neck, Long Island, State of New York.
E. Claude Mills	Residing in the City of New York, State of New York.
John G. Paine	Residing in the Town of Westport, State of Connecticut.
Walter Fischer	Residing in Darien, Fairfield County, State of Connecticut.
Gustav Schirmer	Residing in the Cit. of New York,

Saul H. Bornstein	Residing in the City of New York, State of New York.
Sigmund Spaeth	Residing in the Town of Westport, State of Connecticut.
Anne Paul Nevin	Residing in the Town of Bluefield, State of Maine.
Deems Taylor	Residing in the City of Stamford, State of Connecticut.
Ella Herbert Bartlett	Residing in the City of New York, State of New York.
Oley Speaks	Residing in the City of New York, State of New York.
William J. Hill	Residing in the City of New York, State of New York.
Jane Sousa	Residing in Long Island, State of New York.

Since all these witnesses reside more than one hundred miles from the place of trial, we respectfully request that the Court enter an order permitting their testimony to be taken in the City of New York, or at their respective residences, at such times and upon such terms as this Court may order.

If the Court should prefer, we desire an opportunity to present for oral testimony in the presence of the Court as [fol. 372] many of these witnesses as it will be possible to produce.

I have known all of the above witnesses for many years. I am sure that they can qualify as experts on the issues presented by the bill of complaint and the papers for temporary injunction, and that their personal knowledge of the matters in dispute will enable them to give testimony as to matters which will show the value of the matter in controversy.

I have known Gene Buck for over twenty years. He is one of the outstanding figures in the entertainment field of the nation, and he has been intimately connected with the stage and with matters concerning copyrighted musical compositions, the value of copyrights, the methods under which they are exploited, the value of renewal rights, the customs and usages of the music business, the necessity for the issuing of blanket licenses, the expense involved and the inability to function under any other system, the organization and method of operation of the American Society of

Composers, Authors and Publishers, the common interest of all its members, and the manner in which the royalties collected by the Society are distributed among its members.

I have known E. Claude Mills for over twenty years. Mills was for many years in a very responsible position in the vaudeville business of the country, and has great familiarity with theatrical shows and productions and with copyrighted musical works used in connection therewith. He also has been an executive of the American Society of Composers, Authors and Publishers for many years and knows the practical operation of the Society and the practical [fol. 373] problems involved in the licensing of copyrighted musical compositions. He has also endeavored to compile statistics as to the ownership of copyrighted musical compositions and of the various rights therein. He is competent to testify as to the cost of attempting to compile such information, which is required by this Statute, and the difficulty in securing accurate information. This testimony is of the utmost importance since the failure to file complete information as required by the Statute will result ultimately in the forfeiture of complainants' copyrights. He is familiar with the value of those copyrights from his many years of experience, and his testimony, elicited with proper opportunity for cross-examination, will be of great aid in determining the question of jurisdiction.

I have known John G. Paine for over fifteen years. Paine was for many years associated with the Victor Talking Machine Company in charge of its copyright bureau, and he has a wide and extensive knowledge of copyrighted musical compositions and their exploitation and the cost of preparing information on the ownership of copyrighted musical compositions. Paine was also for two and one-half years connected with the office of the Register of Copyrights in Washington, D. C., working actively with the then Register of Copyrights, Mr. Thorvald Solberg. While in that office he had first-hand contact with the problems of copyright ownership, registration, recording, and questions of ownership and title. He is thoroughly familiar with the workings of that office and the information therein deposited. Paine also for many years was the head of the Music Publishers Protective Association and knows the problems of the pub- [fol. 374] lishers, writers and composers, knows the manner of the exploitation of their works, the value of the renewal rights and of the performing rights and the manner

in which musical compositions generally are exploited both in the United States and abroad.

Walter Fischer, Gustav Schirmer and Saul H. Bornstein, all of whom I have known for approximately twenty years are respectively at the head of vast business enterprises engaged in the publication of copyrighted musical compositions. They are preeminent in their respective fields, are well acquainted in the customs and usages of the business, with the value of musical copyrighted works, the cost of compiling information with respect thereto, the difficulties entailed, the manner in which rights under these compositions are frequently carved out and licensed and assigned to various people, with the difficulties of locating the owners of the various rights and with the cost of compiling the information required by the Statute.

Dr. Sigmund Spaeth is a well known writer, lecturer and radio commentator on musical works. He has had vast experience in musical compositions, was a lecturer at universities in musical departments, is an organizer of mu[illegible] groups, has written many standard works on music, has lectured throughout the United States and other countries of the world on musical works, has lectured over the radio for many years with respect to musical compositions, has a wide acquaintance with publishers, writers and composers in the United States, and I believe is conceded by all to be the foremost expert on the subject in this country.

[fol. 375] Deems Taylor, Oley Speaks and William J. Hill are prominent composers.

Taylor is also a well known radio commentator, and was for many years musical and dramatic critic on New York newspapers. He is also a composer of symphonic works, and enjoys a high reputation as a composer and expert on musical matters.

Oley Speaks and William J. Hill have been composers for many years and are familiar with the problems of their profession, and they, as well as Taylor, can testify with respect to the value of their musical compositions and to the value of the renewal rights therein. They have sold interests in their respective musical compositions for a great many years and have received royalties therefor. They are familiar with the amounts received by others and with the problems in securing fair and just compensation for the commercial uses of their compositions.

Mrs. Nevin and Mrs. Sousa have first-hand knowledge

with respect to the value of musical works composed by their respective deceased husbands, and can testify as to the value of these works, as to the value of the renewal rights, as to the cost of obtaining information with reference to infringement and prosecution for infringement of their respective musical compositions.

Mrs. Ella Herbert Bartlett, daughter of Victor Herbert, can testify as to the value of his works now owned by her. She can also testify as to the value of renewal rights, and the amounts received by her from sales of interests in musical compositions composed by her late father, and for inter-
[fol. 376] ests in the renewal rights and for bona fide offers made for the same.

All of the above named complainants whose testimony is sought to be given, can testify as to their membership in the American Society of Composers, Authors and Publishers, as to the royalties that they have received over the years from the said Society, as to the respective amounts thereof, as to the periods when the same were paid, as to their common interest in the moneys received by the Society, as to any other matters as this Court may deem pertinent in determining the jurisdiction of this Court.

We respectfully urge that the Court grant the complainants an opportunity to present the testimony of these witnesses in the manner above indicated, for all of which no previous application has been made.

The reason an order to show cause is prayed for is that complainants desire to bring the hearing of this motion on before the order on the motion for temporary injunction and motion to dismiss the complaint is settled and entered, and it is respectfully prayed that the settlement and entry of an order on the motion for temporary injunction and motion to dismiss the complaint, pursuant to the opinion of this Court, be stayed and held in abeyance until the final disposition of this motion.

Louis D. Frohlich.

Sworn to before me this 14th day of May, 1938. Belle G. Balatow, Notary Public, Queens Co. Queen's Co. Clk's No. 66, Reg. No. 14. N. Y. Co. Clk's No. 132, Reg. No. 0B117. Kings Co. Clk's No. 222, Reg. No. 3I0. Bronx Co. Clk's No. 31, Reg. No. 113B40. Commission Expires March 30, 1940. (Seal.)

[fol. 377] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE—Filed June 2, 1938

Upon the affidavit of Louis D. Frohlich herein filed May 17th, 1938,

It is Ordered that defendants, and each of them show cause before this Court at the Courthouse thereof, in the City of Tacoma, State of Washington, on the 28th day of June, 1938, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made and entered herein permitting the complainants to offer oral testimony by witnesses before this Court at a time to be fixed by this Court, or by deposition at times and places to be fixed by this Court, upon the question of the value of the matter in controversy and matters incidental thereto.

In the meantime and until the final determination of this matter or until the further order of the Court, all proceedings herein are stayed, including the settlement and entry of an order upon the application for temporary injunction and the motion to dismiss the complaint.

[fol. 378] Sufficient cause appearing therefor, service of a copy of this order, and the affidavit upon which it is based, upon the respective attorneys for the defendants, on or before the 15th day of June, 1938, will be deemed good and sufficient service.

The Clerk is further directed to mail a copy of this order to Vanderveer & Bassett, solicitors for complainants.

Signed at San Francisco, California, this — day of ——, 1938.

Bert Emory Haney, Circuit Judge.

Signed at Tacoma, Washington, this 2nd day of June, 1938.

Edward E. Cushman, District Judge.

Signed at Seattle, Washington, this — day of ——, 1938.

—— ——, District Judge.

Copy of this Order mailed to Hon. Judges Haney and Bowen, to Vanderveer & Bassett, Attorneys, Alaska Bldg., Seattle, June 2, 1938.

E. Redmayne, Dep. Clerk.

[fol. 379] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF SERVICE—Filed June 14, 1938

STATE OF WASHINGTON,
County of King, ss:

B. H. Camperson, being first duly sworn, on oath deposes and says:

That at all times herein ~~mentioned I have~~ been, and now am a citizen of the United States and a resident of the State of W[illegible]gton, over the age of twenty-one years, not a party to or interested in the above-entitled action and competent to be a witness therein.

That on the 6th day of June, 1938, I received copies of an original Order to Show Cause and supporting affidavit in the above-entitled action, and that on the 6th day of June, 1938, I duly served the same upon Mr. Alfred J. Scweppe and Mr. Clark Belknap, by delivering to and leaving with said attorneys for defendants, personally, in Seattle Washington, a true and correct copy of the said original Order [fol. 380] to Show Cause and supporting affidavit. I also duly served the same upon B. Gray Warner, by delivering to and leaving at his office in Seattle, Washington, a true and correct copy of the said original Order to Show Cause and supporting affidavit.

B. H. Camperson.

Subscribed and sworn to before me this 13th day of June, 1938. H. W. Haugland, Notary Public in and for the State of Washington, Residing at Seattle. (Seal.)

[fol. 381] [File endorsement omitted].

IN UNITED STATES DISTRICT COURT

[Title omitted].

TRANSCRIPT OF PROCEEDINGS ON ORDER TO SHOW CAUSE WHY AN ORDER SHOULD NOT BE MADE PERMITTING COMPLAINANTS TO OFFER ORAL TESTIMONY BY WITNESSES, ETC.—Filed Aug. 24, 1938

[fol. 382] Tacoma, Washington,
June 28th, 1938, 10:00 o'clock, A. M.

Be it Remembered that this matter came on for hearing in the Court Room of the above entitled court at Tacoma, Washington, at 10:00 o'clock in the forenoon on June 28th, 1938, before a statutory three-judge Court composed of Honorable Bert Emory Haney, United States Circuit Judge for the Ninth Circuit, Honorable John C. Bowen, United States District Judge for the Western District of Washington and Honorable Edward E. Cushman, United States District Judge for the Western District of Washington, pursuant to an Order to Show Cause, filed herein June 2nd, 1938, why an order should not be made and entered herein permitting the complainants to offer oral testimony by witnesses before this Court at time to be fixed by this Court, or by deposition at times and places to be fixed by this Court, upon the question of the value of the matter in controversy and matters incidental thereto.

Complainants appeared by Louis D. Frohlich and Herman Finkelstein of New York City and H. W. Haugland of Sweeney & Haugland, Seattle, Washington, of Counsel for Complainants, defendants appeared by John E. Belcher, Assistant Attorney General and Alfred J. Schweppe of Mesmicken, Rupp & Schweppe, Seattle, Washington, Solicitors and Attorneys for Defendants, Intervening defendant, K. M. O. Inc., appeared by Kenneth C. Davis, 1005 West 7th Street, Los Angeles, California and intervening defendant, John G. Lockhart appeared by Clark Belknap, 512 Hoge Bldg., Seattle, Washington.

[fol. 383] The following proceedings were had:

Judge Haney: Equity 606, Buck vs. Case, comes before us on an application by Complainants to take more testimony and consideration of Findings, Conclusions and Decree.

[fol. 384] Mr. Frohlich: This is an application on the part of the Complainants to take testimony of a number of witnesses to prove the jurisdictional facts that have been alleged in the complaint and affidavits on this application for a temporary injunction.

Your Honors handed down the opinion in this case a few weeks ago and when I read it it seemed to me that I owed a duty to the Court. The Court apparently has felt that the jurisdictional facts have not been properly brought out. It is held—as I read the opinion—that the affidavits and the complaint, having been challenged by the motion to dismiss for want of jurisdiction, were insufficient to give this court jurisdiction.

I did not believe when this application was argued originally that there was any controversy at all as to the facts of jurisdiction and so far as this record shows the defendants have never come forward with any affidavits or proof which puts in issue these jurisdictional facts. They have made a lot of statements in briefs and they argued long and eloquently before the Court that there was no jurisdiction but the very facts of jurisdiction, Your Honors, as I see it, were not properly placed in controversy and for that reason when this application was argued I did not want to take up the time of the court with Mr. Mills, whom I had in the court room and who I had on the stand. I did not examine him as to these all important jurisdictional facts. Since Your Honors have written your opinion and have pointed out that in your opinion the jurisdictional facts were not proven sufficient to give the court jurisdiction over this [fol. 385] controversy I thought that as an aid to the Court it was my duty to make this application so Your Honors could exercise your discretion and hear testimony. I brought on from New York City, three thousand miles away, three witnesses whom I consider amply qualified to testify with respect to these jurisdictional questions. I have brought a witness from Los Angeles. We have gone to considerable expense and labor to give you all of the facts, because we know the court wants the facts. It was my fault perhaps that they were not properly presented before. I want the Court to hear their testimony or have their depositions taken, just as Your Honors decide.

Very briefly, the people I have brought are these—Mr. Gene Buck who is President of this American Society, a

writer of note and distinction with a record of a quarter century of experience in the amusement field. He has written plays and songs, produced plays and knows every nook and corner of the business and is a man well qualified to give Your Honors the facts with respect to which we complain that this statute deprives us.

We have brought Mr. Mills again with his full experience in thirty years in this field. Both of these gentlemen have been with the Society for a great many years and can testify with respect to the structure of the Society and the manner in which its funds are disposed of, because I want to show that this Society is not the "AP". This Society has property rights which it has a right to protect and these property rights which are lost by the operation of this statute grossly and vastly exceed the sum of three thousand dollars.

[fol. 386] Mr. Mills is well qualified and is probably the only witness who can testify as to figures and as to the manner and disposition of these funds. We have brought a writer—Mr. Edgar Lesley, who has had a great deal of experience for over thirty years and who has valuable property rights and knows that this statute destroys these rights. He can testify with respect to the value of these rights. No general statement but actual figures and facts.

We have brought the foremost woman composer in America, Mrs. Carrie Jacobs-Bond—an old lady in feeble health, who has traveled fifteen hundred miles to this court to tell her story to the court and to tell this court how this statute will deprive her of her livelihood and how it will render her helpless against the users of music in the State of Washington.

I know that this court is busy and I don't want to unduly take up the time of the Court, but I would like an opportunity, Your Honors, to present these witnesses today. I can promise I will not be long with them. I think in possibly two or three hours I can cover the ground with all of them and give Your Honors facts and figures that will enable you to decide then whether there is before this court more than three thousand dollars involved. I am sure it will be beneficial to Your Honors in coming to your ultimate decision in this case and I respectfully ask that this application be granted.

Judge Haney: Does the testimony that you have in mind go further than to direct itself to the jurisdictional amount with respect to A. S. C. A. P.?

Mr. Frohlich: It directs itself to the jurisdictional amount with respect to A. S. C. A. P. and the members of the [fol. 387] American Society. The testimony will give, I am sure, very illuminating evidence on the question of the Society itself and the functioning of the directors with respect to the individual members.

Judge Haney: Will the testimony that you have in mind show that with respect to individuals more than three thousand dollars is involved?

Mr. Frohlich: Yes, Your Honor.

Judge Haney: How many individuals have you here?

Mr. Frohlich: Every member of the Society.

Judge Haney: You don't mean that the testimony of forty-four thousand members is to be taken?

Mr. Frohlich: No, it will show that the individual complainants here have involved with respect to themselves more than three thousand dollars and it will show that every member of the Society has that much involved. I am not trying to show anything with respect to the foreign members of the Society, neither are the foreign members included. I am confining myself here strictly to the complainants. This group will be directly involved in this evidence.

Judge Haney: I expect the members will be directly involved. Does your testimony go to the point of showing that the individual members, aside from the American Society, are in the position of saying that more than three thousand dollars of their property is actually involved?

Mr. Frohlich: Perhaps I don't understand what you mean by "individual members aside from the Society". If there was no Society there could be no members.

Judge Haney: If there was no Society these writers and composers could come into the State of Washington and sell [fol. 388] their music——

Mr. Frohlich: This testimony will establish that all of the owners of copyrights, publishers and writers of music will suffer more than three thousand dollars injury by the operation of the statute. Gene Buck the individual has a double interest. He is not only acting in behalf of the Society but he is acting as an individual who receives royalties each year and as a writer who will be vitally effected by this statute in excess of three thousand dollars.

Judge Haney: What are the allegations of your Bill under which you offer to produce this testimony?

Mr. Frohlich: In addition to Paragraph 6, page 5, which is the general allegation that there is involved more than three thousand dollars, exclusive of interest and costs, I have in the Complaint very elaborate allegations with respect to this jurisdictional amount. In paragraph 8 of the Complaint we allege the publisher members, of which there are three named as complainants, have copyrights which are in danger of confiscation under the statute and the value of these copyrights is in excess of one million dollars which is a very considerable amount——

Judge Haney: Where are you reading from?

Mr. Frohlich: The printed complaint. Page 10, line 7 from the bottom, beginning with the words "that the value of the copyrights owned by each publisher is in excess of $1,000,000.00;"

Judge Haney: Do you contend that that is an allegation showing the jurisdictional amount which is in suit?

Mr. Frohlich: That allegation taken with the other al- [fol. 389] legations in the rest of the paragraph. You have to read that all together. If Your Honors please, the rest of it says that it is impossible at any given time to ascertain the names or addresses of the persons who at any time have had an interest in such respective copyrights.

Judge Haney: Is that the part you have in mind? In other words it is impossible to establish. Isn't that equivalent to saying that the jurisdictional amount is not involved because it is impossible to show?

Mr. Frohlich: I don't think that is so because I have following that that he would be compelled to expend a sum in excess of $25,000 for payment to investigators, lawyers, clerical help and other expenses, in an attempt to compile and formulate a list of their respective copyrights containing the data required by the statute. Mr. Mills is competent to testify what it would cost the Society because he has been compiling lists for ten years and knows a great deal about it.

Judge Haney: Do you think that is an allegation of the jurisdictional amount? Suppose it cost one hundred thousand dollars and by doing it he makes a profit of twenty thousand?

Mr. Frohlich: This isn't a question of making a profit. The statute demands a list be compiled by the Society. Mr. Mills can testify as to the cost of compiling that list and the figures will surprise Your Honors. When you look at that

statute and see what it requires and the cost of complying by the Society you will learn that it involves greatly in ex- [fol. 390] cess of three thousand dollars.

Judge Haney: I, for one, do not agree with you that the test of whether or not the three thousand dollars is involved is to be measured by what it costs to do a thing. It might cost many many times that amount and not involve three thousand dollars. The cost of doing business is not the measure. The question is what is involved? The right to do business free of the statute is the thing involved. That right is or is not of a value of more than three thousand dollars. Where is that allegation in your Bill and where is this proposed testimony in any manner throwing light on that?

Mr. Frohlich: This Society, if it is to continue in business as a Society in the combination that it takes form, can not exercise any rights unless it complies in this State with the statute and in order to comply with the statute it must do certain things and these things are a burden, onerous and expensive and cost a great deal more than three hundred thousand dollars. You can't destroy a combination under the statute and then say that the statute does not involve the jurisdictional amount. You are taking this association that functions lawfully and this statute says you can not function—you are illegal here and if you want to function here you have got to do so and so and if we try to do so and so it is going to cost a great deal of money. I think we come squarely within every rule of law as to jurisdiction.

Judge Haney: How is this distinguished from the McNutt case?

Mr. Frohlich: It is a question of whether we comply with the statute. We can't comply with it in full. If we don't [fol. 391] comply with it we are out. I don't understand. As a matter of fact in the McNutt case there was no allegation as to what they would have to spend. There are other allegations in the complaint and what the writer has to do and what the publisher has to do. The value of the renewal rights for twenty-eight years and the thousands of compositions that are utterly destroyed by this statute. In the McNutt case there was no allegation as to what it would cost to comply with the statute. What it would cost if they attempted to comply. What more can anyone say? What more could be framed in a bill of complaint? I don't know and I propose to give proof of what it would cost and what would happen if we don't comply with the statute. I would

like to put these witnesses on and have them cross examined by these defendants' attorneys.

Judge Haney: Perhaps we are somewhat in the fog with respect to the matter you are trying to present but from our viewpoint it seems to us that you are urging that the value of the thing in controversy is to be measured by the cost of doing business or complying with the statute. From our standpoint we think the cost of doing business has nothing to do with the method of doing business. It is true the statute may necessitate a large expenditure but that would not mean anything because by a large expenditure you might make a much larger profit. Perhaps we don't understand each other but I think that is the basis of measuring the value of the matter in controversy.

[fol. 392] In the McNutt case the Court says:

"The question arises whether the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, so as to give the District Court jurisdiction."

The court goes on to say:

"Respondent invokes the principle that jurisdiction is to be tested by the value of the object or right to be protected against interference. But in the instant case, the statute does not attempt to prevent respondent from conducting its business. There is no showing that it cannot obtain a license and proceed with its operations. The value or net worth of the business which respondent transacts in Indiana is not involved save to the extent that it may be affected by the incidence of the statutory regulation. The object or right to be protected against unconstitutional interference is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed."

From our viewpoint that is ~~the~~ thing that must be worth more than three thousand dollars.

"The particular allegations of respondent's bill as to the extent or value of its business throw no light upon that subject. They fail to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve. The bill is thus destitute of any appropriate allegation as to jurisdictional amount save the general allegation that the matter in controversy exceeds

$3,000. That allegation was put in issue and *and* the record [fol. 393] discloses neither finding nor evidence to sustain it."

It seems to me that if you apply the doctrine laid down here that your bill is subject to the same criticism. The thing involved here is your right to do business free of this Washington statute and that is what must involve more than $3000.00, and that isn't to be established by the amount of business in Washington or the cost of doing business in Washington, because for that matter, unless the allegation is that that was at a loss I don't see how it could be sufficient.

Mr. Frohlich: I realize that in the McNutt case that question was involved but I say this statute imposes first upon the Society—I will come to the members later—first upon the Society it imposes a burden so that in order to comply with the statute the burden would be in excess of three thousand dollars and if there were no compliance the burden would be in excess of three thousand dollars. We get from this State each year, roughly, sixty thousand dollars. That is the amount the Society has lost.

Judge Haney: Has the Society lost it?

Mr. Frohlich: The Society. The Society has lost that. It has lost sixty thousand dollars by the operation of the statute. If the Society were compelled to go out of business entirely the loss might run into terrific figures. I say sixty thousand dollars have been lost. We show, in order to comply with the statute, the various items of expense and if there is no compliance with the statute there is a continual loss of revenue to the Society from this Statute of Washington. We [fol. 394] had a loss of sixty thousand dollars. That is established. We have been receiving sixty thousand dollars and we can't forget that. That is the money we get out of the State of Washington. We have lost it. What more can you urge to show a loss than this sixty thousand dollars? I am claiming that it has lost at least sixty thousand dollars and in order to come in and obtain that sixty thousand it would have to go through a process of compilation of lists at an expense which is very large and very greatly in excess of three thousand dollars so that either way the Society has lost a substantial amount of money. So far as the Society is concerned, its loss is much more than three thousand dollars.

Judge Haney: Suppose the Society complied with this statute at a considerable expense and as a result of such compliance made a much larger profit?

Mr. Frohlich: That is speculation.

Judge Haney: You are talking about measuring the value of a thing by the cost of doing business. I am doubtful if we can agree with you. To illustrate my point, how would you consider that cost if it was to increase your business? Would you still contend you had lost something?

Mr. Frohlich: I think that is speculation. I don't allege we will get any more than sixty thousand dollars.

Judge Haney: You do not allege it but you say that if you comply you must of necessity lose something.

Mr. Frohlich: We have lost sixty thousand dollars.

Judge Haney: You haven't lost that at all, if you increase [fol. 395] your business. You might increase the cost of doing business and as a result it would increase your business to $940,000. It wouldn't be any loss at all.

Mr. Frohlich: The complaint does allege a loss. The complaint alleges that there has been a loss of this revenue. That's a loss.

This statute provides that if they give up their contracts with the Society they may come into the State of Washington and they may license others to use publicly and perform for profit their works. This is a very important part of the statute because my papers are replete and I can prove by witnesses that if any individual members want to come into the State of Washington—no longer as members of the combination but as individuals and if they should attempt to market their works in this State they would be unable to do so and they would be helpless and at the mercy of the users of their material, particularly the radio broadcasters. I am prepared to show—and think my papers do show—that the individual complainants have rights in copyrights which greatly exceed three thousand dollars and renewal rights which greatly exceed three thousand dollars that under this statute, since they would be unable to protect their rights in this State, since they would be unable to duplicate the work of the Society and hire investigators, lawyers and others to protect them against infringement in this state, they would lose their rights in copyrights in this state—the value of the performing rights in this State—that value is in ex- [fol. 396] cess of three thousand dollars. That allegation runs to the complainants separately.

Judge Cushman: What right has this court to assume that the criminal statutes of the State of Washington will not be enforced?

Section 2 of this statute makes it unlawful for any person to publicly perform for profit the dramatic compositions or other copyrighted works without the consent of the owner.

Mr. Frohlich: So does the copyright law and for twenty-four years the only method under which the owners of copyrights could enforce their rights was through the Society and that's one of the big issues in this case. These people are helpless to protect their rights against infringement. They can not do it. As a practical matter they are absolutely at the mercy of the users of music unless they belong to this organization and consequently that is a big issue in this case. I am prepared to put a witness on right now who can prove that the works of these people have been performed all year in the State of Washington without any opposition whatever and without compensation to the complainants and this is going on right along. I am prepared to do that today. That is the livelihood of these men and women and their rights should be protected. I am prepared to show that these men and women individually have no way of compelling enforcement of the copyright law and that has been the history of the copyright law for twenty-five fol. 397] years. We can not close our eyes to facts. I think this is one of the big issues in this case and it will have a serious effect on the question of jurisdiction. They are making their living this way. Their works are involved. They can come in and protect these rights. They have another interest for they are under contract with the Society and they have a vital interest because if they were compelled to give up the contract with the Society if they wanted to comply they can not come in and as a practical matter enforce their rights as individuals. That is a vital matter on the question of jurisdiction. I respectfully urge that this Court should take that into consideration. I have a witness present who can testify to what has been happening throughout the country for twenty-five years with respect to the performing rights.

Judge Haney: Before you are seated, will you—I would like to hear from you on the question of whether or not the Society is to be distinguished from the Associated Press on the theory that it is non-profit?

Mr. Frohlich: Yes, I will be glad to do that. In the KVOS case it was held that the Associated Press was a members corporation. The members contributed to an association for a pro rata share of the expense of procuring the news. Someone came along and unfairly competed in a certain territory with respect to news broadcasting and a number of newspapers were vitally affected by the unfair competition. Instead of these newspapers coming in the Associated Press came in and maintained it had been damaged and sought [fol. 398] redress by way of injunction and indemnity. It hadn't been damaged. The court pointed out that even the three newspapers had continued to pay their pro rata share to the Association and there wasn't the slightest damage to anybody. The damage was in the future. The Associated Press had no particular interest whatever in that unfair competition. The most that could have happened to it would be that the newspapers might withdraw and that hadn't happened so the Associated Press had no standing and there wasn't anything involved so far as it was concerned.

Here the Society concludes these agreements and it doesn't earmark these funds—so much from this and so much from that and to John Jones. It puts this money in a common fund. That fund is the property of the Society and no one else at the moment. It creates a reserve fund. That has been in existence for a long time. If any of the contracts with some of the users are cancelled there would have to be a return of some of the money. It has a relief fund which it administers. Taxes have to be paid.

Judge Haney: You are arguing that is the property of the Society?

Mr. Frohlich: Yes. In this way. It classifies publishers and writers and composers. Each one has a separate classification under which the prorata shares will be determined so that class A would have fifty members and they would all receive an equal part of the fund. One for publishers, one for authors and composers. The Board decides the classification of the authors and publishers and they qualify themselves and receive compensation under this system of classi- [fol. 399] fication. I can not see the slightest connection between the A. P. and this kind of an organization where these members obtain their revenue collectively, in that manner—when monies are retained for relief funds, expenses, taxes etc. This reserve fund has to be kept up and taxes have to be paid. The Society does not have to dis-

tribute any of this. This Society may retain all of that money. It doesn't have to declare it. The interest of these members is joint and the interest is not several. Each one has a joint interest. That's how the money is divided. Here is an Association with a property right. It suffers when it can't do business here. These compositions have been turned over for a five year period. The members don't own them any more. The Society owns them. There isn't the remotest connection with the KVOS case. My associate calls my attention to this, from the KVOS case:

"Assuming, without deciding, that in the circumstances disclosed the respondent has standing to maintain a suit to redress or prevent damage caused its members by petitioners conduct, the allegation of possible damage to them is wholly inadequate, because the asserted danger of loss of members is a mere conclusion unsupported by even a suggestion that withdrawal has been threatened by any newspaper, and no intimation is given of the character or extent of the damage they would suffer by such withdrawal."

We have certainly shown here by allegation both in the Complaint and affidavits that the statute is so designed that the damage would first fall upon the Society because the Society is outlawed. It says we are outlaws and can't do [fol. 400] business in this State and in the next breath says you can come in and do business provided you do it on a per piece system. The Society issues blanket licenses and has issued blanket licenses since it was organized. Its articles of association compel it to issue blanket licenses and that is the only way it can operate.

Mr. Schweppe: May it please the Court, before this court of course can grant the application such as is made here this morning, it is essential, first that the complainants file a bill of complaint which on its face states jurisdiction. We have urged from the beginning jurisdiction has never been stated. If we are right in that assumption the court can not direct testimony to be taken to establish anything unless the jurisdictional facts are alleged. The jurisdiction of the district court is to be determined by the allegations of the complaint. Until a complaint has been filed which on its face gives this court jurisdiction to make an inquiry into the jurisdictional facts, there is nothing for this court to hear.

What are the jurisdictional facts alleged in this complaint in the first place? If the court please the whole inquiry at this time is whether or not jurisdictional facts are alleged on the face of the complaint. The inquiry must be as to what is the value of the business in the State of Washington. This complaint shows what? It shows, at some point, we got out of the State of Washington, in the year 1936, sixty thousand dollars. So far as I know it might have cost them sixty-one thousand dollars. There is nothing to show that isn't so and this court can not presume jurisdiction. [fol. 401] Further than that, this complaint alleges the Society has a membership of 44,000. There is nothing to show what any individual composer, author or publisher has at stake in the state of Washington, because the sixty thousand dollars, on the face of the complaint, was distributed to over forty-four thousand members. We can not infer jurisdiction. We can not assume that somehow somewhere some of these complainants got three thousand dollars out of the State of Washington and that it didn't cost them anything to do business. Counsel says they lost sixty thousand dollars in 1937. That's an assumption that it didn't cost them anything to do business. Unless these people combine they have no restraint. The criminal provisions in Section 2 of this Act, which affords them protection, have been in force ever since this legislation was enacted. As I pointed out previously the individual copyright owner is not subject to the act. The act specifically exempts individuals. How can an individual member have three thousand dollars involved? They say if an individual were not a member of the Society it would cost five, ten or fifteen thousand dollars to protect their rights in the State. So far as I know there is no—there is absolutely no allegation in this bill that a single piece of music belonging to any of the individual complainants was played in the State of Washington in 1936. This bill is devoid of any allegation that they were entitled to a dime or that they lost a cent. There is absolutely nothing here to show it.

Going a step further, the KVOS case, 299 U. S. 269, it seems to me is absolutely in point. That is a case where the [fol. 402] Associated Press is in the business of selling news service to its members and it collects large revenues. It does not render service free. It collects large revenues from its members. That appears in the Supreme Court's decision and any amounts that remain over expenses it dis-

tributes to its members just as does this organization. There is no distinction between that case and this. How can it, in the light of the KVOS case lose anything? Your Honors, the Court held that it didn't have any stake involved and I can't see how it can be distinguished from the KVOS case.

I want to analyze one or two allegations of the complaint. We have here a case where the court does not have jurisdiction on the face of the complaint, and therefore it has no jurisdiction to inquire into the jurisdictional facts.

As I said a moment ago there is an allegation about it costing these people three hundred thousand dollars to comply with the statute. So far as the complaint is concerned that is not incurred but for these forty-four thousand authors, composers and publishers, members of the Society. Nobody can tell. I asked counsel to point out what it would cost the Society itself with its large membership as distinguished from these individual members—to point out a single place where there is an allegation which shows what it would cost them if they were doing business individually, but as Your Honors have pointed out, that is not the test. What is the value of the object to be achieved —that is, to be free from this restraint. They might be operating at a loss in the State of Washington so far as [fol. 403] appears from this bill it may have cost them a hundred thousand. This Court and the Supreme Court has ruled a thousand times that you can not infer jurisdiction, from the allegations of the complaint. It can not be presumed. It must positively and affirmatively appear. It is not sufficient that the jurisdiction may be inferred argumentatively from the pleadings, but the averments must be positive. No jurisdiction is stated as to the Society on the face of the bill. If I am right in that assumption then the Court is not faced with the duty of pursuing an inquiry into the jurisdictional facts. Let us assume that I am entirely wrong about it. Let's assume that a general allegation of jurisdictional amount is alleged. If it is contradicted by other allegations in the bill, as the Supreme Court has held in a number of cases that the general allegation that the amount in controversy exceeds the sum of $3000 exclusive of interest and costs is sufficient "unless the bill contains others which qualify or detract from it in such measure that when all are considered together it cannot fairly be said that jurisdiction appears on the face of the com-

plaint, in which case the suit should be dismissed by the court sua sponte or upon defendant's motion". I have cited a number of cases. Lion Bonding Co. v. Karatz, 262 U. S. 77, 86 where the Court said this: "Since the bill in this case discloses that the amount in controversy was less than the jurisdictional amount, the general allegation that it exceeds this amount, is therefore of no avail."

[fol. 404] The same thing appears at the bottom of page 5 of my brief in the KVOS case where the Court says: "unless the bill contains others which qualify or detract from it in such measure that when all are considered together it cannot fairly be said that jurisdiction appears on the face of the complaint, in which case the suit should be dismissed by the court sua sponte or upon defendant's motion." Those cases are all of the authority we need. Where the allegations affirmatively show a lack of jurisdictional amount the general allegation is insufficient.

I should like to suggest one or two other matters for Your Honors attention.

In the opinion filed, Your Honors held that the bill of complaint did not show this court had jurisdiction, the opinion reading: "It therefore affirmatively appears from the fact of the complaint, notwithstanding the formal allegation of jurisdictional amount, that the society has not the requisite amount of pecuniary interest under the decision of KVOS v. Associated Press, 299 U. S. 269, 278.

We also challenged, on our motion to dismiss, that, assuming this court did have jurisdiction as a federal court, it did not have jurisdiction as a Court of equity. Your Honors passed that motion. This is what you said:

"By the foregoing it appears that a, if not the, major purpose of the Bill is to deprive the State courts of an opportunity to exercise the jurisdiction saved to them by the express terms of the Act under which this court was created and under which complainants ask it to enjoin de-
[fol. 405] fendants from bringing such authorized suits in a court of the State.

In view of the conclusion herein reached it will not be determined whether, under such circumstances, the court should attempt to spell out jurisdiction of other parts of this suit.

As already stated, each of the defendants, in the motion to dismiss, state:

'4. That defendants assert that they do not intend to enforce the criminal penalties of the act until the validity of the act is adjudged.'

The consideration of the effect of this disclaimer upon the jurisdiction of the Court as a court of equity (Spielman Motor Co. v. Dodge, 295 U. S. 89-96) should in any event be deferred until the court determines its jurisdiction as a district court.''

In the interest of brevity, I suggest to Your Honors, before any testimony is allowed in this case, certainly it ought to be determined whether the complaint states a cause of action, entitling them to relief in equity, and that, where that is the state of the record, even if it had jurisdiction as a district court, it would not have jurisdiction as a court of equity. What is the use, I suggest, of having an inquiry as to whether this court has jurisdiction, where the complaint does not state a cause of action in equity anyway?

If Your Honors, at this stage of the case, in considering the application, should conclude that notwithstanding all [fol. 406] of this, the application to have oral testimony should be granted, it should be done on terms.

These defendants for whom I appear should not be required to incur expense. All of these defendants are state officials and it seems a far cry to assume that they should make a case within the jurisdiction of this court and should be required in order to help these people make out a case against them to go to the expense of taking depositions and so on. I say the Court has a right to impose terms and I should say the imposition of terms by way of costs would be entirely proper. They ought not to be put to any additional expense in connection with complainants' effort to make a case within the jurisdiction of this court, where such application is late and is addressed to the court's discretion.

The action of the complainants in this case is very unusual in respect to bringing witnesses here this morning. I guess counsel don't practice law like we do here. I served notice on opposing counsel and if I had intended to bring witnesses I would have notified counsel two weeks ago to do it properly. No such notice was given and so far as the three witnesses being brought here is concerned I didn't know until they came in the court room that they would be here. I thought it would be recognized that we would have

a right to prepare for such hearing and we would have a right to produce opposing witnesses and cross examination, to controvert any showing they might make. The court wants all of the facts. I say in any event it would seem to me, that if the court is of the opinion that it should [fol. 407] exercise its discretion in favor of granting the leave herein applied for, it should be on terms only and these officials should not be required to go to this expense merely because they failed to make a case and have it done at the expense of the State of Washington, and finally I say, if Your Honors are disposed to grant this application, certainly leave should not be granted today where counsel have not seen fit to notify us. I submit this court has no jurisdiction and leave should not be granted to take oral testimony in this cause.

I have noticed for this morning the presentation of findings, conclusions and decree in accordance with the memorandum opinion filed in this case.

Mr. Davis: Would you care to hear any more argument on this matter:

Judge Haney: I think not. I think the intervenors will not be heard. Your statement was that you had submitted findings.

Mr. Schweppe: I have served about the 5th of June proposed Findings of Fact, Conclusions of Law and Decree of Dismissal on opposing counsel. I noticed the presentation of these Findings, Conclusions and Decree for this morning, in the event you deny the application.

Mr. Frohlich: I have prepared Findings. I didn't notice them yet, because I didn't know the Court would consider Findings this morning.

Judge Haney: I think, if you have those proposed Findings of yours—are they in triplicate?

Mr. Frohlich: No, I just have one original.

Judge Haney: Will you hand that to the Clerk so we will have it during adjournment?

[fol. 408] Mr. Frohlich: Yes, Your Honor.

Judge Haney: Have you extra copies of your proposed Findings, Conclusions and Decree?

Mr. Schweppe: Yes I have.

Judge Haney: Leave them with the Clerk please.

Mr. Schweppe: Yes, I shall.

Judge Haney: We are about to take an adjournment until two o'clock. At that time we will determine what will be

done with the application and the Findings and we will determine what will be done in the other case.

The Court then, at 11:35 o'clock A. M., adjourned until 2:00 o'clock, P. M.

[fol. 409] June 28th, 1938, 2:00 o'clock, P. M.

The Court reconvened, pursuant to adjournment, with all members of the Court and counsel present and the following proceedings were had:

Judge Haney: In the Buck case the Complainants' application to take additional testimony is denied. We have signed Findings of Fact, Conclusions of Law and Decree of Dismissal. The Clerk will enter the order and the findings and decree. The Clerk will also mark as lodged with the Court the Complainants' proposed findings.

Mr. Frohlich: May I, for the purpose of the record, make a formal offer of proof of the witnesses Gene Buck, E. C. Mills, Edgar Leslie, Mrs. Carrie Jacobs-Bond and Tommy Thomas, program director for a broadcasting company to testify with respect to the jurisdictional amount and facts. I assume Your Honors deny it?

Judge Haney: Yes.

Mr. Frohlich: I respectfully except.

Judge Haney: Granted.

(Court adjourned.)

[fol. 410] In United States District Court

[Title omitted]

Order Denying Application to Take Further Testimony—Filed June 28, 1938

Complainants' application to take additional testimony, filed May 17th, 1938, is hereby denied.

Done in open court this 28th day of June, 1938.

Bert Emory Haney, Circuit Judge. Edward E. Cushman, District Judge. John C. Bowen, District Judge.

[File endorsement omitted.]

[fol. 411] IN UNITED STATES DISTRICT COURT

[Title omitted]

RECORD OF HEARING—June 28, 1938

This cause comes on for hearing before a three-judge Court composed of the Honorable Bert Emory Haney, Circuit Judge, the Honorable Edward E. Cushman and John C. Bowen, District Judges, pursuant to Order to Show Cause re further testimony and for presentation of proposed Findings of Fact and Conclusions of Law and Decree. Solicitors John E. Belcher, Assistant Attorney General, Alfred J. Schweppe and Kenneth C. Davis are present. Counsel for Complainants are not present at the convening of the Court, but later Mr. Louis D. Frohlich and Mr. Finkelstein appear in Court and Mr. Frohlich commences his argument to the Court re the taking of further testimony. He informs the Court that he has Messrs. Buck, Mills, Leslie and others in attendance to testify. The allegations in Para-
[fol. 412] graph 8 of the Bill of Complaint are argued. Counsel requests permission to take further testimony. At 11:10 A. M. Mr. Schweppe, counsel for defendants, commences his argument, and states his position that the Court does not have jurisdiction on the face of the Complaint and if further testimony is granted to Complainants he requests the imposition of terms and that the State be allowed to prepare to meet this testimony.

The Court does not desire to hear intervenors.

Complainants and defendants now submit their proposed Findings of Fact and Conclusions of Law and Final Decree, and they are taken under advisement until two o'clock P. M.

At two o'clock P. M. Court is again in session. Order Denying Complainants' Application to take Additional Testimony is signed and filed and exception is allowed.

Findings of Fact and Conclusions of Law, as rewritten, are now signed and filed.

Decree of Dismissal, as rewritten, is now signed and filed.

Mr. Frohlich now makes formal offer of proof by witnesses Buck, Mills, Leslie, Bond and Thomas as to the jurisdictional amount in controversy. The offer is denied and exception is allowed.

Complainants' proposed Findings of Fact and Conclusions of Law and Order are now lodged with the Court.

At three o'clock P. M. Court stands adjourned.

[fol. 413] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed June 28, 1938

This cause came on to be heard before a statutory three-judge district court, convened pursuant to section 266 of the Judicial Code, (28 U. S. C., section 380), and consisting of the Honorable Bert Emory Haney, Circuit Judge, and the Honorable Edward E. Cushman and John C. Bowen, District Judges, on the 29th day of June, 1937, upon complainants' application for an interlocutory injunction to restrain the enforcement of chapter 218 of the Laws of 1937 of the State of Washington, upon the alleged ground that said statute or portions thereof violated the Constitution of the United States; and upon defendants' and intervening defendants' several motions to dismiss; and the said application for an interlocutory injunction and the said several motions to dismiss having been duly argued by counsel, and [fol. 414] the said court having heretofore, to-wit, on the 9th day of May, 1938, filed its memorandum decision herein holding that the injunction prayed for should be denied, and the defendants' motion to dismiss, in that the cause is not within the jurisdiction of the court, should be granted; and being duly advised in the premises, Now, Therefore, the court makes the following

Findings of Fact

I

That the allegations of the Bill of Complaint are insufficient to show that the value of the matter in controversy, exclusive of interest and costs, exceeds $3,000.00.

II

That the record does not show that the value of the matter in controversy, exclusive of interest and costs, exceeds $3,000.00.

III

That the record does not show what is the value of the matter in controversy.

And from the foregoing Findings of Fact, the court makes the following

Conclusions of Law

That the complainants' motion for an interlocutory injunction should be denied and that the defendants' motion to dismiss should be granted, in that neither the Bill of Complaint nor the record discloses that the cause is within the jurisdiction of this court as a Federal court for want of [fol. 415] the requisite jurisdictional amount.

Done in open court this 28th day of June, 1938.

Bert Emory Haney, Circuit Judge. Edward E. Cushman, District Judge. John C. Bowen, District Judge.

[fol. 416] [Endorsement omitted]

In United States District Court

[Title omitted]

Complainants' Proposed Findings of Fact and Conclusions of Law—Lodged June 28, 1938

This suit having been duly commenced on May 28, 1937 by filing a subpoena and bill of complaint in this Court, and service of copies thereof having been made upon all the defendants (except "Richard Roe"), and including the defendant Phil H. Gallagher, State Treasurer of the State of Washington, sued herein as "John Doe", and the complainants having moved for a temporary injunction, and due notice of said motion having been made upon the defendants herein, as well as upon the Governor and Attorney General of the State of Washington, and the defendants having appeared herein generally (with the exception of the defendant "Richard Roe"), and including the defendant Phil H. Gallagher, State Treasurer of the State of Washington, sued herein as "John Doe"; and K. M. O. Inc., a corporation and John G. Lockhart having intervened in

this action; and the defendants and said intervenors having duly moved to dismiss the complaint, and all of said motions having duly come on for argument and having been heard on June 29, 1937, at the Federal Courthouse in Tacoma, Washington, this Court hereby makes the following findings of fact and conclusions of law.

Findings of Fact

1. At the 25th Regular Session of the Legislature of the State of Washington there was passed by said Legislature a Bill designated as Chapter 218 of the Laws of 1937 of the State of Washington, House Bill No. 480, and said Bill was [fol. 417] signed by the Governor of that State on March 19, 1937, and became effective on or about June 5, 1937. Said Statute is referred to as the "State Statute" hereinafter; a copy is hereto annexed.

2. The complainant American Society of Composers, Authors and Publishers (hereinafter referred to throughout these findings as the "Society") was at all the times hereinafter mentioned and still is an unincorporated association duly organized and existing under the laws of the State of New York, and has its principal place of business in the Borough of Manhattan, City and State of New York, in the Southern District of New York. The membership of the Society constitutes a substantial number of persons, firms and corporations within the United States who own or control copyrighted vocal or instrumental musical compositions, to wit, a membership of approximately 1,000, consisting of authors, composers and publishers of copyrighted musical works; said Society has contracts now valid and subsisting between it and similar societies situated in the countries of the civilized world, which foreign societies have a membership of approximately 44,000 and under which contracts the Society licensed to users of music within the United States, including the State of Washington, until the effective date of the State Statute hereinafter mentioned, the right to publicly perform for profit all of the copyrighted musical compositions controlled by said foreign societies, as well as by the Society.

3. All of the complainants are citizens of the United States and residents of the State of New York, except complainant, Anne Paul Nevin, who is a resident of the State

of Maine; and defendants are citizens and residents of the State of Washington, and officers of the State of Washington, duly elected, appointed and qualified, empowered, directed and charged by the said State Statute with the duty [fol. 418] of enforcing the criminal and civil provisions thereof.

4. This action is a suit in equity arising under the Constitution and laws of the United States and the matter in controversy exceeds $3,000 exclusive of interest and costs.

5. Under mutual working arrangements with societies in foreign countries throughout the world, the Society has the exclusive right to and does license within the United States, the public performance for profit of the musical compositions copyrighted by all the members of said respective foreign societies, and said foreign societies have the exclusive right to, and do license within the territorial limits of their respective countries, the public performances for profit of the musical compositions copyrighted by members of the Society. Under such arrangements between the Society and said foreign societies, the rights vested in such foreign societies with respect to the licensing of their performing rights in the United States contemplate several and successive sales or licenses of the right to single uses of the copyrighted work where their sole value is in their use for public performance for profit, the right to such use being sold or licensed on each such occasion for a valuable consideration. The right to perform the musical compositions embraced in the catalogues of such foreign societies are included in the blanket licenses issued to individual licensees by the Society in the United States. Such foreign societies represent 44,000 members who are scattered throughout the world; they are not required to file copies of a complete list of their copyrighted works or the prices charged or demanded therefor, nor are they required to file data annually stating the date each separate work was copyrighted, the name of the author, the date of its assignment, if any, or the date of the assignment of any interest therein, if any, or the name of the publisher and the present owner, or the addresses and residences of all parties who have at any time [fol. 419] had any interest in the copyrighted work in order to enjoy copyrighted protection in the United States under the Treaties, Proclamations and Laws of the United States.

6. Compliance with the Statute would require the following:

(a) Issuing licenses in the State of Washington individually and without joining together with others for the purpose of collecting fees or issuing blanket licenses (Sec. 3); or

(b) Issuing licenses collectively on a per piece system of usage, such system not to be in excess of any per piece system in operation in other places where any group or persons affected by the Act does business (Sec. 3); and

(c) Surrendering the right to further restrict the use of a copyrighted work where complainants, or any of them, have sold the right to the single use of the copyrighted work where its sole value is in its use for public performance for profit and where they have received any consideration therefor either within or without the State (Sec. 3); and

(d) Filing two copies of a complete list of copyrighted works once each year in the office of the Secretary of State of Washington, together with a list of prices charged or demanded for their various copyrighted works, stating under oath that said list is a complete catalogue of the files of their claimed compositions, whether musical or dramatic, or of any other classification, and stating the date each separate work was copyrighted, the name of the author, the date of its assignment, if any, or the date of the assignment of any interest therein, if any, and the name of the publisher and the present owner, and the addresses and residences of all parties who have at any time had any interest in the copyrighted work (Sec. 4); and

(e) Even if complainants chose not to issue any licenses [fol. 420] in the State of Washington, if they combine without the State even though such combination without the State be lawful under the laws of such other States, nevertheless they must comply with the above if their musical or copyrighted works are used commercially in the State of Washington or have been used therein, whether originating from a point within the State or from without and as long as any rendition thereof is received or heard within the State, or is intended to be so received by the originator of any musical program (Sec. 6).

7. Non-compliance with the Statute would result in the following definite and unavoidable loss, penalties and forfeitures:

(a) Having their works acquire an involuntary, artificial and unavoidable legal situs in the State of Washington even though no licenses were ever granted by complainants to perform their works publicly for profit or to make any other uses of their works in that State (Sec. 7);

(b) Being involuntarily subjected to the jurisdiction of the Courts of the State of Washington (Sec. 8);

(c) Being subjected to injunction proceedings in the Courts of the State of Washington without personal service and without being within the State, restraining all persons from paying any moneys to complainants (Sec. 9);

(d) If complainants fail to submit to the jurisdiction of the Court, the County Auditor is appointed receiver for all their copyrighted works and property, tangible or intangible and all effects and moneys derived therefrom, the receiver being required to take over all property of complainants that he may find within the State, including all the copyrights which are given artificial situs in the State (Sec. 9);

(e) The seizure by such receiver of all copyrighted works of complainants regardless of the situs of such works, in-
[fol. 421] cluding all of the rights to suits for infringement and damages in both State and Federal Courts and all choses in action and all sums due on contracts and licenses likewise regardless of the situs of such choses in action (Sec. 9);

(f) In the event complainants attempt to withdraw their copyrighted works or property from the State of Washington in order to escape the effect of the State Statute or the orders of the Court secured in the manner aforesaid, or to deprive the citizens of the State of the right to use such copyrighted works belonging to complainants, the State Court must immediately direct the receiver to compile a complete list of all the copyrighted works of complainants which have been used in the State, and the Court must convene a State Anti-Monopoly Board which must determine the rate at which the receiver shall charge for the single and separate public performance for profit of each copyrighted

work on a per piece system, the receiver to administer the same for a year, and thereafter all of complainants' works may be confiscated wherever located and situated and escheat to the State of Washington (Sec. 9);

(g) The complainants' works having been escheated and forfeited to the State of Washington, the Court of that State must appoint an officer to execute an involuntary assignment in all the complainants' works and file the same with the Register of Copyrights in Washington, D. C. (Sec. 9);

(h) If complainants should appear in such suit commenced against them as indicated above, they must be deemed to have appeared generally regardless of whether the original service may have been insufficient and they thereupon become subject to the jurisdiction of the Courts of the State of Washington for all purposes (Sec. 10);

(i) In addition to the other penalties provided in the Act, complainants and each of their agents and licensees must be found guilty of a gross misdemeanor and must be fined [fol. 422] in a sum not exceeding $500, or imprisoned in the County Jail for not more than six months, or both (Sec. 11).

8. This action is brought on behalf of the complainants individually and on behalf of all the members of the Society, who sue through Gene Buck as their representative because they are so numerous, and the issues are of general and common interest to all of them, and the action, insofar as it is brought in a representative capacity, is brought to protect a joint right.

9. The cost of complying with the Statute will be far in excess of $3,000. because:

(a) The complainants Carl Fischer, Inc., G. Schirmer, Inc. and Irving Berlin, Inc. (hereinafter referred to as the publisher complainants) would each be compelled to expend a sum in excess of $25,000 for payment to investigators, lawyers, clerical help and other expenses in an attempt to compile or formulate a list of their respective copyrights containing the data required by the statute. The reason for such expenditure is that it is impossible at any given time to ascertain the names or addresses of the persons who at such time have an interest in the respective copyrights; that old

copyrights expire currently and are renewed, sometimes by the publisher and sometimes by the writer and composer or such authors as may be entitled to renewal under the Copyright Act; that new compositions are constantly being registered; that the rights in the copyrights are manifold and are subdivided as to locality, extent and term, and in many cases certain rights are reserved to the author and composer, and disposition thereof is not within the control or knowledge of the publisher complainants and is not readily ascertainable.

(b) If the complainants should attempt to file a list of copyrights as required by the statute, they would have to make expenditures in compiling information not required [fol. 423] under the Copyright Laws and not kept in the ordinary usual course of their own business; they would be compelled to obtain the required data on old and inactive compositions as well as those currently popular; they would have to make a separate search as to present copyrights, licenses on these numbers as well as renewals, foreign grants and other matters. This would require a search in the Copyright Office and inquiry as to the whereabouts of the persons who were at any time interested in each of the copyrights and in the several rights therein.

(c) Such compliance with the statute in getting up this vast catalogue, would mean going back for a period possibly as far as 56 years; making inquiry as to copyright in each case and the person entitled to renewal thereon, which depends upon survivorship of the various persons named in the Copyright Act; a search for any assignments both with respect to those recorded and assignments not recorded; what rights exist with respect to such copyrights in foreign countries; whether any limited rights have been granted, carved out or retained on such copyrights; all license agreements if any, made throughout the world. This exhaustive information must be supplemented each month and an entirely new list filed each year; a large staff of clerks and investigators would have to be employed for that purpose; searches would have to be made in the Copyright Office at Washington, D. C. by trained and skilled persons; lawyers would have to be employed and consulted with respect to these matters and the rights of persons and firms involved both here and abroad; possibly conflicting claims on these

compositions would have to be ironed out and the whole task would be tremendous and costly far in excess of $25,000, and it would be a continuing financial burden because the list would have to be kept up to date. All of this information would apply not only to musical compositions owned by the complainant publishers but to the various arrangements made from time to time on many of these compositions, some [fol. 424] which are owned by them, some possibly by others. These arrangements are copyrighted separately and each arrangement has a separate history, just as in the case of the copyright of an original musical work; a history which concerns separate licenses therein, ownership, restrictions and foreign rights; as well as renewals, some of which may be taken out by one person and arrangements of the same composition renewed by others.

(d) Additional expense would have to be incurred in fixing a price per use on each composition as required by the statute. That would entail taking into consideration the various factors that go to giving a composition value when it is used. There must be investigation of the places where the composition is used; the nature of the use; the character of the artist involved in the performance; the extent of the use; the nature of the audience reached; all of this would require additional expenditures of a considerable sum of money by each of the complainant publishers far in excess of $25,000. In compiling this information in order to comply with the statute, each of the complainant publishers who owns a very extensive musical catalogue, would have to employ musical experts as well as legal experts, and this would require a vast amount of research work and expenditure of large sums of money in an additional amount, far in excess of $25,000. The cost of detecting infringement and bringing suit by each of the complainants individually would exceed $25,000.

(e) It would cost the complainant Anne Paul Nevin in excess of $5,000 to compile the list required by the statute.

(f) It would cost the complainants Deems Taylor and Ella Herbert Bartlett in excess of $10,000 to compile the list required by the statute.

(g) The complainant Society is an unincorporated association composed of over one thousand members. All of the [fol. 425] members of the Society are before this Court

through Gene Buck as their representative, it being impracticable to join as parties all the members of the Society, and the issues and questions involved being of a common and general interest to all the members of the Society.

(h) The amounts which must be spent by the Society in any attempted compliance with the Statute, or which must be forfeited by the Society in the event of non-compliance are amounts in which all the members of the Society have a joint interest, and such amounts represent the value of the matter in dispute for jurisdictional purposes insofar as the Society is concerned.

(i) The Society would have to expend a sum in excess of $300,000 to compile the list and information required to be furnished under the statute.

(j) The cost of obtaining information as to copyrights owned by members of the foreign societies affiliated with the Society, which would be required in order to compile the list to be filed under the statute, would be in excess of $50,000.

(k) In order for the complainant members of the Society to comply with the statute, they would have to surrender, annul or abandon their existing agreements with the Society, from which they have derived in 1936 the following sums:

Carl Fischer, Inc., in excess of $50,000.
G. Schirmer, Inc., in excess of $50,000.
Irving Berlin, Inc., in excess of $50,000.
Gene Buck, in excess of $5,000.
Deems Taylor, in excess of $5,000.
Oley Speaks, in excess of $5,000.
William J. Hill, in excess of $5,000.
Anne Paul Nevin, in excess of $5,000.
Ella Herbert Bartlett, in excess of $5,000.
Jane Sousa, in excess of $5,000.

(l) The complainants above named will receive similar amounts each year down to the end of their existing agreements with the Society, which revenues would be lost to them if they were compelled to surrender, annul or abandon [fol. 426] their existing agreements with the Society.

(m) Since the complainants and other members of the Society have sold the right to a single use of their composi-

tions to the Society, the sole value of which sale is in the use of their works for public performances for profit, neither the Society nor its members may under the State Statute any longer collect royalties for the use of said works. This throws open to users in the State of Washington without further restriction, the right to publicly perform for profit free from any claims by any of the complainants herein, and others similarly situated as to all works owned by members of the Society, resulting in a loss to complainants and other members of the Society, individually and jointly of all right to license the public performance for profit of their copyrighted musical compositions in the State of Washington.

10. Failure to comply with the Statute will result in a loss to each of the complainants individually, and to the complainants as members of the Society jointly, in excess of $3,000, by reason of the following:

(a) If the complainants fail to comply with the Statute and fail to submit to the provisions compelling them to subject themselves to the jurisdiction of the Courts of the State of Washington, all licensees in the State of Washington will be restrained from paying any moneys to them.

(b) Since in the past the Society has received annually and expects to receive annually until December 31, 1940 the sum of $60,530.68 each year from such licensees the complainants will lose at least $180,000 if they do not comply with the Statute, this figure representing the revenue for the unexpired period of the existing contracts between the Society and its licensees in the State of Washington.

(c) Since the Statute provides that under such circum- [fol. 427] stances all the complainants' copyrights are given a situs within the State of Washington and may be seized by a receiver, forfeited and escheated to the State, complainants will lose the entire value of their catalogues if they fail to comply with the Statute.

(d) The value of these catalogues to each of the publisher complainants which would thus be lost to them is in excess of $1,000,000.

(e) The value of the works of complainants Buck, Taylor, Speaks, Hill, Nevin and Sousa is in excess of $100,000 as

to each of such complainants, including the value of the right of renewal.

(f) Since the entire income of complainants from their respective businesses or occupations is dependent upon the continued existence, validity and ownership of their respective copyrights, this Statute would destroy all income that complainants have been receiving from that source over the years and which they are receiving at the present time.

(g) The average net profits of complainants Carl Fischer, Inc., Irving Berlin, Inc. and G. Schirmer, Inc. for each of the past five years have exceeded $25,000 as to each of them. Each of them has received sums in excess of $50,000 each year from the Society under their respective contracts with it, and the value of such contract to each of them is in excess of $200,000; the value of the entire catalogue of each of said complainants is in excess of $1,000,000. In addition to the loss of revenue, each complainant will remain liable on leases in excess of $20,000 a year, which payments must be made notwithstanding the fact that non-compliance with the State Statute would result in destruction and confiscation of their respective businesses.

(h) Complainants Anne Paul Nevin, Deems Taylor and [fol. 428] Ella Herbert Bartlett have each received from the Society annually for upwards of six years sums ranging from a minimum of $3,000 to a maximum of $9,000. Since the respective contracts of these complainants have three years to run, the value of such contracts to them ranges from a minimum of $12,000 to a maximum of $25,000, which sums will be annually lost to them under the provisions of this Statute.

(i) In addition to the above mentioned forfeitures and penalties provided by the Statute, each of the complainants will be subjected to a fine not exceeding $500 or imprisonment in the county jail for not more than six months, or both. Since there are at least 528 establishments publicly performing for profit complainants' copyrighted music within the State, the complainants may be fined 528 times 500, or a total sum in excess of $250,000. There are 30 counties within the State, in each of which complainants have one or more licensees. The penalties to which com-

plainants would be subjected, if only one prosecution were brought against them in each of those counties, would be in excess of $15,000.

11. The complainant Society as such, representing the joint rights of all its members will be injured in a sum in excess of $3,000 by reason of the following:

(a) Under its Articles of Association the Society has the right to grant licenses and collect royalties for the public representation of the works of its members and to allot and distribute such royalties; to acquire, own and sell real and personal property, and to accumulate and maintain a reserve fund to be used in carrying out any of the objects of the Society; to enter into agreements with other similar associations in foreign countries, providing for the reciprocal protection of the rights of the members of each society; to do any and all other acts or things which may be found necessary or convenient in carrying out any of the [fol. 429] objects of the Society; the duration of the Society is to be ninety-nine years; the dues are nominal; each member must execute an assignment in a form approved by the board of directors, vesting in the Society the exclusive right to license the non-dramatic public performance of the members' works for the period of any then existing agreement between the Society and its members; the Society is managed by a board of twenty-four directors having power to determine rules of its procedure and make all regulations necessary for carrying on the business of the board of directors and the officers, agents and servants of the Society; the board of directors have the power to manage the business of the Society, including the power to make contracts and to fix the rate, time and manner of form of royalties for the performance of all works copyrighted by members of the Society, and to collect such royalties; to maintain legal proceedings to enforce payment of such royalties, as well as claims of damages and penalties for unlawful performances, and to distribute the royalties among the members in the proportionate shares provided for in the scheme of allotment of royalties prescribed in the articles.

(b) The Society alone, through its board of directors has the power to enforce the right of public performance for profit as to all musical compositions owned by its members,

and those members during the period of the contract have no rights whatsoever with respect to those works, except the right to receive royalties in the manner provided for by the articles of association.

(c) The board of directors also has the power to purchase or otherwise acquire for the Society any property, rights and privileges which the Society is authorized to acquire; to make such regulations and take such action as it may deem advisable for the protection of the property and for the general objects of the Society, to control and [fol. 430] dispose of all funds belonging to the Society, and to determine the manner and form of investment and the depositaries of such funds.

(d) All royalties and license fees collected by the Society are from time to time as ordered by the board of directors, distributed among its members, provided, however, (a) that all expenses of operation of the Society and sums payable to foreign affiliated societies must be deducted therefrom and duly paid; and (b) that the board of directors, by two-thirds vote of those present at any regular meeting may add to the reserve fund any portion not exceeding 10 per cent of the total amount available for distribution; and (c) that the net amount remaining after such deduction for distribution must be apportioned one-half to the publishers and one-half to the composers and authors; and unclaimed royalties which have been apportioned remain with the Society for six years, and if not claimed, become the absolute property of the Society.

(e) The right of the members to receive royalties is not absolute; in the event of their bankruptcy, their rights are forfeited; under no circumstances may they sell or otherwise dispose of the right to receive royalties, nor may they create a lien thereon.

(f) The amount received by the members is determined by a classification committee, which must, in considering the allotment to be made to each member, take into consideration the number, nature and character of works composed, written or published by such member, the popularity and vogue of such works, the length of time in which the works of the member have been a part of the catalogue of the Society and generally the prestige, reputation, qualifica-

tions, standing and service which such member has rendered to the Society. The classification committee must create several classes, and each class must consist of a group of members having a like status. Each member of such group must share equally in the distribution of royalties with the other members of such group.

[fol. 431] (g) The Society may not under its articles of association operate on a per piece basis. It must consider the other elements mentioned above and must group its members in classes, all of the members in a particular class receiving identical treatment regardless of certain variations that might exist as to the works composed or performed or as to the period of membership.

(h) A relief committee is appointed by the president, consisting of one publisher, one author and one composer. This committee may direct payments of such sums as it deems proper in its judgment to satisfy the immediate necessities of the members, and to make advances from the royalties and to give financial aid and assistance to the members, their widows, infant children or indigent parents. This fund is administered out of the relief fund that is set aside from the collection of royalties, as heretofore stated.

(i) Title to all moneys collected by the Society is in the Society. It maintains a reserve fund; it maintains a fund for its administration expenses and for foreign societies; it maintains its bank accounts, and it disburses as and when it pleases the remaining sums collected by it to its members pursuant to its classification method.

(j) The assignment by all the members to the Society is exclusive and irrevocable for the period provided for in each of the contracts, all of which expire on December 31, 1940. No member may withdraw his catalogue from the Society prior to the expiration date of the contract. Each member of the Society consequently has an interest in the performing rights of all the other members of the Society; and such interest is vested in the Society, which is composed of all its members who jointly own, administer and market the rights vested in the Society collectively. It is no different from a partnership. No member may exercise any right individually. The only action that may be taken [fol. 432], is joint and not several. Consequently, the

$60,000 collected annually by the Society from the State of Washington, and the licenses issued by the Society and now in force in that State, represent a collective and joint right; and the right involved is a joint one which cannot be subdivided.

(k) The right of the Society in all moneys collected by it, and its right in all the performing rights of all its members are property rights, with title at all times, both in the royalties collected and in the performing rights, vested absolutely and completely in the Society.

12. Complainants will be able to license users of their music in the State of Washington without doing any act in said State, but unless the injunction prayed for is granted, complainants will be unable to issue any licenses from without the State of Washington without incurring the penalties of said State Statute. The copyrighted works of the complainants and of all the other members of the Society and of its associated affiliated societies are being, and have been constantly performed in the State of Washington and each and every county therein, and will continue to be performed therein.

13. The said State Statute is class legislation; it is aimed only at proprietors of musical copyrights and no other copyrights, and it exempts the performance of musical works which are not copyrighted under the laws of the United States but which are protected at common law. A great many forms of copyright and kinds of copyrighted works are presently and constantly dealt in, licensed, sold and otherwise made available within the State of Washington, such as motion pictures, dramas, newspapers, magazines, books and periodicals, none of which is affected by said State Statute.

14. Said State Statute attempts to vest in the Courts of [fol. 433] the State of Washington the right to determine the ownership of complainant's copyrights, to issue involuntary licenses thereunder, to confiscate such copyrights as well as other property rights of the complainants, and to annul and alter the terms of existing license agreements without properly securing jurisdiction over complainants, who are not residents or domiciled within the State of Washington, and are not doing business therein, and who have no

agency within said State and have no property which has a situs within said State.

15. Said State Statute is in its terms so drastic, and the penalties attached to the violation of the terms thereof are so great, that neither complainants nor others similarly situated may continue to grant licenses to users of music within the State of Washington or even to users of music without such State if the public performance for profit of such music may be reproduced or performed within such State. There are thirty counties in the State of Washington, in each of which there are establishments publicly performing for profit the copyrighted musical compositions of members of the Society, and the foreign societies with which the Society has reciprocal arrangements; and if complainants attempt to issue licenses or collect from licensees or attempt to detect infringements of their copyrighted works in said counties they will be subjected to a multiplicity of suits and prosecutions and unless defendants are restrained complainants will be unable to secure any compensation for the public performance for profit of their respective copyrighted musical compositions within the State of Washington; complainants and others similarly situated will be unable to enforce any contracts made between them or on their joint behalf by the Society with residents or citizens of such State; complainants and others similarly situated, as well as the Society, have been compelled since the effective date [fol. 434] of the State Statute, to desist from licensing the public performance for profit of their copyrighted musical compositions in such State, and have been and are deprived of all sources of revenue therefrom, and have been and are denied the privileges granted to them by the United States Copyright Act; and the Society has been and is compelled to desist from enforcing collection of payments under existing contracts between it and users in the State of Washington, and has been and is denied liberty of contract, and has been and is compelled to desist from investigating infringements of the copyrights of complainants and other members of the Society and its affiliated societies by means of the public performance for profit of their respective copyrighted musical compositions; and complainants will continue to suffer as aforesaid unless this Court grants injunctive relief; and complainants and the Society and its affiliated societies have been and are hindered, delayed and im-

peded in enforcing their rights and remedies under the United States Copyright Act in the Federal Courts located in the State of Washington for infringements committed by users within such State by means of public performances for profit of the copyrighted musical compositions aforesaid, all because of the drastic provisions of the said State Statute and the numerous penalties, civil and criminal, to which the complainants will be liable in the event of any violation of said State Statute; and complainants and others similarly situated have been and are unable to detect and sue for infringement of their copyrighted musical works within the State of Washington and will continue so to be, unless enforcement of said State Statute be restrained by this Court.

16. Complainants have no adequate remedy at law, and are relievable only in this Court of equity and if complainants should not be afforded the equitable relief prayed for herein but should be required to resist criminal prosecutions [fol. 435] and other suits or proceedings instituted under the State Statute, which would result in such a multiplicity of suits and entail such delay and so jeopardize and injure complainants in their persons and property as to make the remedy at law grossly inadequate.

Conclusions of Law

I. The Bill of Complaint states facts sufficient to constitute a cause of action against each and every one of the defendants.

II. The State Statute is not a reasonable exercise of the police power of the State of Washington, and the penalties and confiscatory provisions and requirements of filing certain data and of issuing licenses on the basis therein provided for are not reasonably necessary to meet any alleged evil; enactment of the State Statute was not necessary to protect, nor does it serve the public interest of the State of Washington; the object, purpose and effect of the Statute is to take the copyrighted musical compositions of the complainants, and other similarly situated, for a private purpose, to wit, to benefit the 528 users within the State of Washington; the said State Statute discriminates against, and in fact, confiscates the copyrighted musical compositions and other property of complainants, as well as those

of others similarly situated; it is contrary to and hinders carrying out the purpose of Article 1, Section 8 of the Constitution of the United States, and will deter composers, authors and publishers from securing copyright registration of their works.

III. The State Statute is an invasion of complainants' constitutional rights in the following respects:

(a) It interferes with and destroys the pattern of the Copyright Law by which Congress has endeavored to carry out the purpose of the Constitution to insure certainty and [fol. 436] uniformity in the field of copyright.

(b) It denies to complainants equal protection of the laws, and by making them presumptively guilty of the criminal provisions therein denies to the complainants due process of law.

(c) It impairs obligations of contracts entered into between complainant Society acting on the joint behalf of all its members and 528 users of music within the State of Washington, and contracts between the thousand members of the Society, including the other complainants and the Society, and between the Society and similar societies operating in foreign countries, and contracts between writers and composers and their respective publishers.

(d) It interferes with complainants' liberty of contract in the State of Washington and elsewhere.

(e) It deprives complainants of their right of free access to the Federal Courts to maintain suits for infringement for the unlawful public performance for profit of their copyrighted musical compositions.

IV. The said State Statute is vague, uncertain and indefinite and fails to apprise complainants and others similarly situated of what acts they may omit or commit which would constitute a crime under said State Statute.

V. The said State Statute subjects complainants to a multiplicity of suits by each of the 528 users within the State of Washington with whom they have contracts, by each of the District Attorneys in the State of Washington, and by the Attorney General of said State, as well as by the State Treasurer and the Secretary of State of said State.

VI. The penalties, civil and criminal, and the forfeitures provided for in said State Statute are harsh, oppressive [fol. 437] and unreasonable, and such penalties and forfeitures are cruel and unusual.

VII. The said State Statute violates Article 1, Sections 8, 9 and 10, Article III, Section 2, Article IV, Section 2 and Article VI, Section 2 of the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States, and Article I, Sections 3, 12, 16 and 23 and Article II, Sections 19 and 28 of the Constitution of the State of Washington.

VIII. Complainants have no adequate remedy at law and are relievable only in this Court of equity, and if complainants are not afforded the equitable relief prayed for in the bill of complaint but are required to resist when criminal prosecutions and other suits or proceedings are instituted under said State Statute, it would result in such a multiplicity of suits and entail such delay and so jeopardize and injure complainants in their persons and property as to make the remedy at law grossly inadequate, and unless an injunctional order is issued, complainants will be irreparably damaged.

IX. Complainants are entitled to an injunction enjoining and restraining, until the further order of this Court, the defendants and each of them individually and in their capacity as officials of the State of Washington, charged by said State Statute with the enforcement of the provisions thereof, from bringing, directly or indirectly, any proceeding at law or in equity for the purpose of enforcing said State Statute against the complainants and other similarly situated, representatives, employees, agents or any of them, and from interfering with all existing contracts entered into by the complainants and others, including the Society and citizens and residents of the State of Washington, and from threatening to enforce against any citizen or resident [fol. 438] of the State of Washington the penalties of said State Statute in the event such citizens and residents desire to carry out their contracts with the Society, or the other complainants, or others similarly situated, and from prosecuting criminally the complainants, their representatives or agents or any of them, or others similarly situated, for doing any act or thing to detect infringements and to enforce

their respective rights under the United States Copyright Act in the Federal Court of the State of Washington or elsewhere, and generally from doing any act or thing to carry out or enforce any of the provisions of said State Statute.

X. That a bond in the sum of $— conditioned upon the payment to defendants of such costs and damages as may be incurred or suffered by any part found to have been wrongfully enjoined by this order, will adequately protect defendants against any injury that may be suffered in the event that the injunction pendente lite to be entered herein shall not be made permanent.

XI. The State Statute constitutes an attempt to restrict and to regulate the right of complainants to the full enjoyment of the exclusive rights granted them by the Laws of the United States, generally known as the Copyright Laws.

XII. That the motions to dismiss the complaint be denied.

XIII. That this Court has jurisdiction of this suit.

XIV. That the application for interlocutory injunction, be and the same is granted.

Dated at Tacoma, Washington, June —, 1938.

——, U. S. C. J. ——, U. S. D. J. ——, U. S. D. J.

[fol. 439] [File endorsement omitted]

In United States District Court, Western District of Washington, Southern Division

In Equity. No. 606

Gene Buck, Individually and as President of the American Society of Composers, Authors and Publishers, et al., Complainants,

vs.

Otto Case et al., Defendants; K. M. O., Inc., a Corporation, Intervening Defendant; John G. Lockhart, Intervening Defendant

Decree of Dismissal—Filed June 28, 1938

This cause came on to be heard before a statutory three-judge district court, convened pursuant to section 266 of the

Judicial Code (28 U. S. C., section 380), and consisting of the Honorable Bert Emory Haney, Circuit Judge, and the Honorable Edward E. Cushman and John C. Bowen, District Judges, on the 29th day of June, 1937, on complainants' application for an interlocutory injunction to restrain the enforcement of chapter 218 of the laws of 1937 of the State of Washington, upon the alleged ground that said statute or portions thereof violated the Constitution of the United States; and upon defendants' and intervening defendants' several motions to dismiss; and the said application for an interlocutory injunction and the said several [fol. 440] motions to dismiss having been duly argued by counsel, and the said court having heretofore, to-wit, on the 9th day of May, 1938, filed its memorandum decision herein holding that the injunction prayed for should be denied and the defendants' motion to dismiss, should be granted, in that this cause is not within the jurisdiction of this court as a federal court; and the court having heretofore duly made and entered its findings of fact and conclusions of law herein, and being duly advised in the premises, the court does now, here, order, adjudge and decree as follows:

I

That complainants' motion for an interlocutory injunction be and the same is hereby denied and

II

That this cause be, and the same is hereby dismissed, as not being within the jurisdiction of this court as a federal court, in that neither the allegations of the Bill of Complaint nor the record shows that the value of the matter in controversy, exclusive of interest and costs, exceeds $3,000.00.

Done in open court this 28th day of June, 1938.

Bert Emory Haney, Circuit Judge. Edward E. Cushman, District Judge. John C. Bowen, District Judge.

[fol. 441] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed August 1, 1938

[fol. 442] The petitioners, Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, Carl Fischer, Inc., G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, the complainants in the above-entitled action, considering themselves aggrieved by the decree and order dated June 28, 1938, by this court, dismissing the bill of complaint herein, denying complainants' motion for an interlocutory injunction and denying leave to complainants to present additional testimony for the purpose of establishing the value of the amount in controversy, which decree and order were made and entered by three Judges in accordance with the provisions of Section 266 of the Judicial Code (United States Code, Tit. 28, Section 380, do hereby appeal from said decree and order of this court to the Supreme Court of the United States, and pray that this appeal may be allowed, and that a transcript of the record of proceedings and papers upon which said decree and order were made, duly authenticated, may be sent to the Supreme Court of the United States, and the bond fixed at the sum of $500.00.

Dated: Seattle, Washington, August 1, 1938.

H. W. Haugland, Counsel for Petitioners, 905 Arctic Building, Seattle, Washington. Thomas G. Haight, Louis D. Frohlich, Herman Finkelstein.

[fol. 443] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed August 1, 1938

Come now the complainants in the above entitled cause and file the following assignment of errors upon which they will rely in the prosecution of the appeal from the inter-

locutory order denying the temporary injunction and the final order dismissing the Bill of Complaint for want of jurisdiction made and entered in this cause on the 28th day of June, 1938, and say that the Court erred in the following respects; to wit:

1. The Court erred in dismissing the Bill of Complaint.

2. The Court erred in denying complainants' motion for a temporary injunction.

[fol. 444] 3. The Court erred in refusing to consider the complainants' motion for temporary injunction on its merits.

4. The Court erred in holding that this suit was not within its jurisdiction as a Federal Court.

5. The Court erred in holding that the following allegations of the Bill of Complaint as substantiated by the affidavits in the record were insufficient to show that the value of the matter in controversy, exclusive of interest and costs, exceeds $3,000, viz.:

(a) It is impracticable to join as parties all of the more than 1,000 members of the American Society of Composers, Authors and Publishers (hereinafter referred to as the "Society"); they have a common, general and joint interest in the issues and questions and amounts involved in this suit.

(b) The Society, on behalf of all its members jointly, would be required to expend a sum in excess of $300,000 to compile the lists and information required under the Statute.

(c) The cost of obtaining the necessary information as to copyrights owned by members of the foreign societies affiliated with the Society would be in excess of $50,000.

(d) The complainants, members of the Society, appearing through Gene Buck as their representative, have a joint interest in contracts between the Society and 528 users of copyrighted music in the State of Washington, from whom such complainants jointly receive a sum in excess of $60,000 annually.

[fol. 445] (e) The State Statute prevents complainants from receiving said sum of $60,000 annually, or any part thereof, and nullifies and invalidates all of said 528 contracts.

(f) It would cost complainants Carl Fischer, Inc., G. Schirmer, Inc., and Irving Berlin, Inc., in excess of $25,000 each for payment to investigators, lawyers, clerical help, and other expenses, in an attempt to compile or formulate a list of their respective copyrights containing the data required by Section Four of such State Statute.

(g) It would cost Carl Fischer, Inc., G. Schirmer, Inc., and Irving Berlin, Inc., an additional sum in excess of $25,000 each to detect infringements in the State of Washington, and to bring suit therefore in an attempt to comply with the Statute.

(h) It would cost the complainants Anne Paul Nevin, Jane Sousa, Gene Buck, William J. Hill and Oley Speaks in excess of $5,000 each to compile the list required by the Statute.

(i) It would cost the complainants Deems Taylor and Ella Herbert Bartlett in excess of $10,000 each to compile the list required by the Statute.

(j) The Statute compels the individual complainants to surrender, annul and abandon their existing contracts with the Society, from which they derived in 1939 the following sums, which sums they would also be entitled to for the balance of their respective agreements with the Society, all of which expire on December 31, 1940: Carl Fischer, Inc., G. Schirmer, Inc. and Irving Berlin, Inc., each in excess of [fol. 446] $50,000; Gene Buck, Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, each in excess of $5,000.

6. The Court erred in holding that the persons whose affidavits were submitted on behalf of complainants were not qualified to express an opinion concerning the cost of complying with the requirements of Section Four of the State Statute, and in refusing to accept, on the ground that there was no opportunity for cross examination, the statements of such affiants to the value of their property rights—particularly in ... of the Court's subsequent refusal to permit such affiants to testify orally in the presence of the Court and with full opportunity for cross examination.

7. The Court erred in denying complainants' application to take additional testimony and complainants' offer of

proof for the purpose of establishing the value of the amount in controversy.

8. The Court erred in holding that one, if not the major, purpose of the Bill of Complaint is to deprive the State Courts of an opportunity to exercise the jurisdiction saved to them by the express terms of the act under which the Court below was created, and under which complainants asked such Court to enjoin defendants from bringing such authorized suits in a Court of the State.

9. The Court erred in refusing to hold that the State Statute is not a reasonable exercise of the police power of the State of Washington; that the penalties and confiscatory provisions and requirements of filing certain data and of issuing licenses on the basis therein provided for are [fol. 447] not reasonably necessary to meet any alleged evil; that enactment of the State Statute was not necessary to protect and that it does not serve the public interest of the State of Washington; that the object, purpose and effect of the State Statute is to take the copyrighted musical compositions of complainants and others similarly situated for private purpose, to wit, to benefit the 528 users within the State of Washington; that the State Statute discriminates against and, in fact, confiscates the musical compositions and other property of complainants and others similarly situated; that it is contrary to and hinders carrying out the purpose of Article I, Section 8 of the Constitution of the United States, and will deter composers, authors and publishers from securing copyright registration of their works.

10. The Court erred in refusing to hold that the State Statute is an invasion of complainants' constitutional rights in the following respects:

(a) It interferes with and destroys the pattern of the Copyright Law by which Congress has endeavored to carry out the purpose of the Constitution to insure certainty and uniformity in the field of copyright.

(b) It denies to complainants equal protection of the laws, and by making them presumptively guilty of the criminal provisions therein denies to the complainants due process of law.

(c) It impairs obligations of contracts entered into between complainant Society acting on the joint behalf of all

its members and 528 users of music within the State of Washington, and contracts between the thousand members [fol. 448] of the Society, including the other complainants and the Society, and between the Society and similar societies operating in foreign countries, and contracts between writers and composers and their respective publishers.

(d) It interferes with complainants' liberty of contract in the State of Washington and elsewhere.

(e) It deprives complainants of their right of free access to the Federal Courts to maintain suits for infringement for the unlawful public performance for profit of their copyrighted musical compositions.

(f) It interferes with treaties between the United States and foreign countries respecting copyrights, and proclamations of the President of the United States recognizing the existence of certain reciprocal conditions between the United States and foreign countries in respect of copyrights.

11. The Court erred in refusing to hold that the State Statute denies due process of law to complainants and others similarly situated in that it is so vague, uncertain and indefinite that it fails to apprise them of what acts they may omit or commit which would constitute a crime under the State Statute.

12. The Court erred in refusing to hold that the State Statute subjects complainants to a multiplicity of suits by each of the 528 users within the State of Washington with whom complainants have contracts, by each of the District Attorneys in the State of Washington, and by the Attorney General of said State, as well as by the State Treasurer and the Secretary of the State of said State.

13. The Court erred in refusing to hold that the penalties, civil and criminal, and the forfeitures provided for in the State Statute are harsh, oppressive and unreasonable, and such penalties and forfeitures are cruel and unusual.

[fol. 449] 14. The Court erred in refusing to hold that the State Statute violates Article I, Sections 8, 9, 10; Article III, Section 2; Article IV, Section 2; Article VI, Section 2, of the Constitution of the United States, and the Fourteenth

Amendment to the Constitution of the United States, and Article I, Sections 3, 12, 16 and 23, and Article II, Sections 19 and 28 of the Constitution of the State of Washington.

15. The Court erred in refusing to hold that complainants have no adequate remedy at law, and are relievable only in a Court of Equity, and that if complainants are not afforded the only equitable relief prayed for in the Bill of Complaint, but are required to resist when criminal prosecutions or other proceedings are instituted under the State Statute, it would result in such a multiplicity of suits and entail such delay and so jeopardize and injure complainants in their persons and property as to make the remedy at law grossly inadequate, and that unless an injunctional order be issued, complainants will be irreparably damaged.

16. The Court erred in refusing to hold that the complainants are entitled to an injunction enjoining and restraining until the further order of such Court the defendants and each of them, individually and in their capacity as officials of the State of Washington charged by such State Statute with the enforcement of the provisions therein, from bringing directly or indirectly any proceeding at law or in equity for the purpose of enforcing said State Statute against complainants and others similarly situated; representatives, employees, agents or any of them, and from interfering with all existing contracts entered into by complainants and others, including the Society, and citizens and [fol: 450] residents of the State of Washington, and from threatening to enforce against any citizen or resident of the State of Washington the penalties of said State Statute, in the event such citizens and residents desire to carry out their contracts with the Society or other complainants or others similarly situated, and from prosecuting criminally the complainants, their representatives or agents or any of them or others similarly situated; for doing any act or thing to detect infringements and to enforce their respective rights under the United States Copyright Act in the Federal Court of the State of Washington or elsewhere, and generally from doing any act or thing to carry out or enforce any of the provisions of said State Statute.

17. The Court erred in refusing to hold that the State Statute constitutes an attempt to restrict and to regulate the rights of the complainants to the full enjoyment of the

exclusive rights granted them by the laws of the United States, generally known as the Copyright Laws.

Wherefore, complainants pray that the said order and decree be reversed, and that a decree be entered:

A. Denying the motions to dismiss the Bill of Complaint herein.

B. Granting the complainants' application for a temporary injunction.

C. Enjoining and restraining until the further order of the District Court for the Western District of Washington, Southern Division, the defendants Phil H. Callagher, individually and as State Treasurer of the State of Washington [fol. 451] (sued herein as "John Doe"); Cliff Yelle, individually and as State Auditor of the State of Washington; Ernest N. Hutchinson, individually and as Secretary of the State of Washington; G. W. Hamilton, individually and as Attorney General for the State of Washington; B. Gray Warner, individually and as District Attorney of King County of Washington; Harry H. Johnston, individually and as District Attorney of Pierce County of Washington; Ralph E. Foley, individually and as District Attorney of Spokane County of Washington; A. W. Swanson, individually and as District Attorney of Snohomish County of Washington; H. W. Coyalt, individually and as District Attorney of Whatcom County of Washington; Smith Troy, individually and as District Attorney of Thurston County of Washington; Paul O. Manley, individually and as District Attorney of Grays Harbor County of Washington; John D. Evans, individually and as District Attorney of Yakima County of Washington; Glenn L. Bean, individually and as District Attorney of Walla Walla County of Washington; Sam M. Driver, individually and as District Attorney of Chelan County of Washington; and each of them individually and in their respective capacities as officials of the State of Washington, charged by said State Statute with the enforcement of the provisions thereof, from bringing directly or indirectly any proceeding at law or in equity for the purpose of enforcing said State Statute against the complainants and others similarly situated, representatives, employees, agents or any of them, and from interfering with all existing contracts entered into by the complainants and others, including the Society and citizens and resi-

[fol. 452] dents of the State of Washington, and from threatening to enforce against any citizen or resident of the State of Washington the penalties of said Statute in the event such citizens and residents desire to carry out their contracts with the American Society of Composers, Authors and Publishers, or the other complainants, or others similarly situated, and from prosecuting criminally the complainants, their representatives or agents or any of them or others similarly situated for doing any act or thing to detect infringements and to enforce their respective rights under the Copyright Act in the Federal Court of the State of Washington or elsewhere, and generally from doing any act or thing to carry out or enforce any of the provisions of said State Statute.

D. That such temporary injunction be granted on condition that complainants file within thirty days a bond in the sum of $— conditioned upon the payment to the defendants of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined by such order granting a temporary injunction; said bond to be approved by the Clerk of the United States District Court for the Western District of Washington, Southern Division.

H. W. Haugland, Counsel for Complainants. Thomas G. Haight, Louis D. Frohlich, Herman Finkelstein.

[fol. 453] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed August 1, 1938

[fols. 454-533] This day came the complainants by their counsel, and having filed and presented to the court their petition for the allowance of an appeal to the Supreme Court of the United States, together with their assignment of errors and statement as to jurisdiction.

It is Hereby

Ordered, that the appeal prayed for be and hereby is allowed, and the amount of the appeal bond to be entered by appellants is hereby affixed at the sum of $500.00.

Dated at Tacoma, Washington, this 1st day of Aug., 1938.

Edward E. Cushman, United States District Judge.

[fol. 534] IN UNITED STATES DISTRICT COURT

DOCKET ENTRIES

May 28, 1937. Filed Bill of Complaint—Appearance, Pltfs.
" 28, " Filed Praecipe for service of process on Case, Yelle, Hutchinson, Hamilton, Warner, & Johnson—Issued Sub. in Equity.
" 28, " Lodged proposed Order for hear. on Applic. for Temp. Injunc.
" 28, " Filed Mot. for Temp. Injunction.
" 28, " Filed Affid. Gene Buck—Affid. W. S. Fischer —Affid. Saul H. Bornstein—Affid. Gustav Schirmer—Affid. Anne Paul Nevin—Affid. Deems Taylor—Affid. Ella Herbert Bartlett.
June 1, " Filed Praecipe—Issued Subp. in Equity to all defts.
" 9, " Filed Marshal's Ret. on Subp. in Equity (on all debts.) in West. Dist.
" 9, " Filed Marshal's Ret. on Mot. & affidavits.
" 9, " F. & E. Order convening 3-judge Court (Judges Haney, Bowen & Cushman) June 29, at Tacoma.
" 9, " Filed Clerk's Cert. of mail. cop. Order to Judges, Gov. Atty. Genl. & atty. for Complainants.
June 15, " Filed Pet. of KMO Inc. to Intervene and for permission to file & argue Motion to Dismiss.
" 16, " Filed Notice to Pltff. by KMO's attys.
" 16, " Filed Letter (with receipt attached) K. C. Davis to Clk. dated 6/15/37.
" 21, " Filed Notice by Pltff. to Defts.
" 22, " Lodged Motion to Dismiss on Behalf of KMO.
" 25, " Filed Motion to Dismiss on behalf of Defts.
" 25, " Filed Affid. E. E. King—Affid. Don Isham—Affid. Mike Lyons.
" 26, " Filed appearance John G. Lockhart.
" 26, " Filed Mot. to Intervene (Lockhart) as deft.
" 26. " Lodged Mot. (Lockhart) to Dismiss.
" 28, " Filed Letter Ralph Foley, Pros. Atty, Spokane Co. for appear. C. C. Dill in his behalf.
" 28, " Filed Appearance, attys. for all defts.
" 29, " Ent. order allow. KMO Inc. & John G. Lockhart to intervene.

[fol. 535] DOCKET ENTRIES—Continued

June	29, 1937.	Ent. record hearing before 3-judge Court (Judges Haney Cushman & Bowen).
"	29, "	Filed Mot. John G. Lockhart to Dismiss.
"	29, "	Filed Mot. of KMO Inc. to Dismiss.
"	29, "	Ent. Record Hearing Applic. Interloc. or Temp. Injunction & Motions of Defts. & Interven. Defts. to Dismiss—Filed Intervenor, KMO's Exhibit #1.
"	29, "	Filed Complainants' Brief in Support Applic. Temp. Injunc.—Affid. Mills.
"	29, "	Filed Brief of Defts. in opposition Applic. Temp. Injunc. & in support Defts' Mot. Dismiss.
"	29, "	Filed Brief, Intervenor KMO, in sup. Mot. Dis. & in Oppos. Applic. Interloc. Injunc.
"	29, "	Filed Suppl. Brief Intervenor's Mot. Dismiss.
"	29, "	Complainants, defts. & intervenors each given 10 das. file Final Briefs.
"	29, "	Filed 4 Ret. on Subp. in Equity—Filed 4 Ret. on Order, Mot. & Affid.
July	9, "	Filed Complainants Reply Brief in Sup. Applic. Temp. Injunc.
"	9, "	Filed Ans. Brief of Defts.
"	10, "	Filed Brief of Intervenor John G. Lockhart.
"	10, "	Filed Intervening Defts. (KMO) Brief—Citation of Dist. Judge Hand, So. Dist. N. Y.
"	10, "	Briefs mailed to Judges.
"	14, "	Filed Acceptance of Service (of Brief by Davis & Belknap).
Aug.	9, "	Filed Request of Complainants to file Add'l Matter (in trip) mailed to Judges.
"	12, "	Filed Transcript of Proceedings for Interlocutory Injunction etc. (mailed judges).
"	12, "	Filed Request of Intervenor KMO Inc. to strike Pltfs. so called additional matter (mailed judges).
"	12, "	Filed Intervenor Lockhart's Answer to Pltfs. add'l matter.
Oct.	15, "	Filed Additional Authority K. M. O. (in tripl.)—copy to each judge.
Nov.	3, "	Filed Reply to "Add'l Authority".

[fol. 536] DOCKET ENTRIES—Continued

Nov. 9, 1937. Filed Intervenor Lockhart's Ans. Brief (in triplicate).
" 19, " Filed Memo. (copy) Opinion, Dist. Ct. Nebr. (in triplicate).
" 20, " Filed Intervening Deft's Memo. re Nebr. Law. (in triplicate).
" 22, " Filed Letter, Judge Haney to Judge Cushman, inclos. cop. Nebr. Opinion & copies letters.
Dec. 11, " Lodged Letter Vanderveer to clk.
Feb. 9, 1938. Ent. order 3-judge Court (Seattle) request. add'l briefs re value, as of $3000 limit; & where found in the record; briefs to be filed in 20 das. Attys. notified by Seattle office.
Feb. 10, " Filed Transcript 3-judge request for add'l briefs.
" 25, " Filed Complainants' Memo. in support jurisdiction (Cop. to each judge).
" 28, " Filed Brief behalf Intervening Deft. K. M. O.
Mar. 1, " Filed Defts. Memo. on Jurisdictional question.
" 22, " Filed Affid. of service.
Apr. 12, " Lodged Request. Haugland, to file Opin. & Order & Request.
" 12, " F. & Ent. order direct. Clk. file attached Request, together with accompanying Pet. order & Opin. in Buck vs. Landis.
" 12, " Filed Request Haugland file add'l authorities—Order & Opinion in Buck vs. Landis; Copies to Judges Haney & Bowen, cop. of Order to attys. of record.
May 9, 1938. Filed Memo. decision—Injunction Denied. Motion to Dismiss Granted.
" " " Notice filing mailed (this Day).
" 17, " Filed Affi. Frohlich on application re further oral Testimony & taking Depositions.
" 27, " Filed Notice of filing Pet. (affid.) on May 17.
June 2, " Filed & Ent. Order Show Cause—Returnable June 28th.
" 6, " Filed notice Presentation of presentation—Findings, Conclusions, Decree.

DOCKET ENTRIES—Continued

June 6, 1938. Lodged Deft. Proposed Findings, Conclusions. Noted for hearing June 28th.

" 6, " Lodged Deft. Proposed Decree. Noted for hearing June 28th.

" 14, " Filed affi. B. H. Camperson re service s/c Schweppe & Belknap.

" 15, " Filed Notice Belcher Substituted for Donnelly.

June 28, " Filed Defts. memorandum brief in opposition to complainants application for leave to take testimony on question of jurisdictional amount (3 copies).

[fols. 537-551]

June 28, 1938. Ent. record hearing (3-judge Court)—Order s/c re applic. take further testimony.

" 28, " F. & E. Order (3 judges) deny. Complainants' applic. to take further testimony—exception allowed.

" 28, " Filed Praecipe, Pltfs. & issued 2 Subp.

" 28, " Ent. order deny. offer Frohlich. of formal proof by wits. as to amt. in controversy—exception allowed.

" 28, " F. & E. Findings of Fact & Conclusions of Law (Pltfs. F. & C. & Order lodged).

" 28, " F. & E. Decree of Dismissal (3 judges)—no jurisdiction shown.

Docket & Index.

Aug. 1, 1938. Filed Pet. for Appeal.

Filed & entered Order Allowing Appeal.

Filed Assignment of Errors.

Filed Cost Bond.

Filed Statement as to jurisdiction.

Filed Citation on Appeal.

Aug. 5, 1938. Filed Affid. of Service of Pet. for Appeal, etc.

Filed Praecipe for Transcript.

Aug. 11, 1938. Filed Stip. to add items 34, 35 and 36 to Praecipe.

Filed Stip. to delete and alter certain items of record.

Aug. 17, 1938. Filed Appearance Counsel for Complainants and Appellants.

DOCKET ENTRIES—Continued

Aug. 19, 1938. Filed Appellees' Answer to Appellants' Statement as to Jurisdiction—(See Rule 12, para. 3, Supreme Court).

Aug. 24, 1938. Filed Transcript of proceedings of June 28, 1938.

[fols. 552-554] Citation in usual form filed Aug. 1, 1938, omitted in printing.

[fol. 555] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED PURSUANT TO RULE 13 OF THE RULES OF THE SUPREME COURT—Filed September 7, 1938

Come now the appellants Gene Buck, individually and as President of The American Society of Composers, Authors and Publishers, Carl Fischer, Inc., G. Schirmer, Inc., Irving [fol. 556] Berlin, Inc., Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, and state that the points upon which they intend to rely in this Court in support of their claim that the court erred in dismissing the bill of complaint, in denying complainants' motion for an interlocutory injunction and refusing to consider such motion on its merits, and in holding that the suit was not one within its jurisdiction as a Federal Court in that neither the allegations of the bill of complaint nor the record shows that the value of the matter in controversy, exclusive of interest and costs, exceeds $3,000, are as follows:

(1) The bill of complaint alone discloses that the value of the matter in controversy is in excess of $3,000, exclusive of interest and costs, and incidentally the affidavits presented on the application for the interlocutory injunction support the bill in that respect.

(2) The court below had jurisdiction regardless of the amount involved, in view of the substantial claim that the Washington State Statute denies equal protection of the laws and denies to complainants certain privileges and immunities of citizens of the United States.

(3) The State Statute violates Article 1, Section 8, Clause 8 of the Constitution of the United States.

(4) The State Statute deprives complainants of their property without due process of law.

(5) The State Statute interferes with treaties between the United States and foreign countries respecting copy- [fol. 557] rights, and with proclamations of the President of the United States recognizing the existence of certain reciprocal conditions between the United States and foreign countries in respect of copyrights, pursuant to which treaties and proclamations the appellant American Society of Composers, Authors and Publishers (hereinafter referred to as the "Society") has entered into contracts with numerous similar societies existing in foreign countries.

(6) The State Statute denies to appellants equal protection of the laws, and deprives them of privileges and immunities of citizens of the United States.

(7) The State Statute impairs the obligations of the numerous contracts, to wit: contracts between the Society and 528 users of music within the State of Washington; contracts between the Society and its 1,000 members, including the appellants other than the Society; contracts between the Society and similar societies operating in foreign countries, and contracts between the writers and composers and their respective publishers, including appellants other than the Society.

(8) The State Statute interferes with appellants' liberty of contract in the State of Washington and elsewhere.

(9) The State Statute deprives appellants of their right of free access to the Federal Courts to maintain suits for infringement for the unlawful public performance for profit of their copyrighted musical compositions.

(10) The penalties, civil and criminal, and the forfeitures provided for in the State Statute are harsh, oppressive [fol. 558] and unreasonable, and are so enormous and severe as to intimidate appellants from resorting to the courts to test the validity of the legislation, and appellants' only remedy is by suit under Section 266 of the Judicial Code.

(11) The court erred in holding that one, if not the major, purpose of the bill of complaint is to deprive the State Courts of an opportunity to exercise the jurisdiction saved to them by the express terms of the act under which the court below was created, and under which appellants asked such court to enjoin appellees from bringing such authorized suits in a court of the State.

(12) The court erred in refusing to hold that appellants have no adequate remedy at law, and are relievable only in a court of equity, and that if appellants are not afforded the equitable relief prayed for in the bill of complaint, but are required to resist when criminal prosecutions or other proceedings are instituted under the State Statute, it would result in such a multiplicity of suits and entail such delay and so jeopardize and injure appellants in their persons and property as to make the remedy at law grossly inadequate, and that unless an injunctional order be issued, appellants will be irreparably damaged.

(13) The court erred in holding that the persons whose affidavits were submitted on behalf of appellants were not qualified to express an opinion concerning the cost of complying with the requirements of Section Four of the State Statute, and in refusing to accept, on the ground that there was no opportunity for cross-examination, the statements of such affiants as to the value of their property rights—[fol. 559] particularly in view of the court's subsequent refusal to permit such affiants to testify orally in the presence of the court and with full opportunity for cross-examination.

(14) The court erred in refusing to hold that the State Statute is not a reasonable exercise of the police power of the State of Washington; that the penalties and confiscatory provisions and requirements of filing certain data and of issuing licenses on the basis therein provided for are not reasonably necessary to meet any alleged evil; that enactment of the State Statute was not necessary to protect and that it does not serve the public interest of the State of Washington; that the object, purpose and effect of the State Statute is to take the copyrighted musical compositions of appellants and others similarly situated for private purpose, to wit, to benefit the 528 users within the

State of Washington; that the State Statute discriminates against and, in fact, confiscates the musical compositions and other property of appellants and others similarly situated; that it is contrary to and hinders carrying out the purpose of Article 1, Section 8 of the Constitution of the United States, and will deter composers, authors and publishers from securing copyright registration of their works.

(15) The court below abused its discretion in denying the interlocutory injunction and in refusing to consider complainants' application on its merits, and in refusing to permit complainants to offer testimony in open court or by deposition in support of the jurisdictional allegations.

Appellants further state that only the following parts of the record as filed in this Court are deemed necessary to be printed for the consideration of the points set forth above:

(1) Bill of complaint.

[fol. 560] (2) Motion for temporary injunction and affidavits filed in support thereof.

(3) Order convening three-Judge Court.

(4) Affidavit of E. C. Mills.

(5) Statement that due notice of application for interlocutory injunction was duly served on the Governor and Attorney General of the State of Washington and on the attorneys for the defendants more than five days before the hearing thereon.

(6) Statement that petitions of K. M. O. Inc. and John G. Lockhart to intervene were granted by order filed June 29, 1937.

(7) Motion to dismiss on behalf of intervenor K. M. O. Inc.

(8) Motion to dismiss on behalf of defendants.

(9) Affidavits of E. E. King, Don Isham and Mike Lyons filed in opposition to motion for temporary injunction.

(10) Motion of intervenor Lockhart to dismiss.

(11) Transcript of proceedings on motion for interlocutory injunction and motions to dismiss containing narrative statement of evidence.

(12) Order requesting additional briefs as to the value of the amount in controversy filed February 9, 1938.

(13) Memorandum decision filed May 9, 1938.

(14) Affidavit of L. D. Frohlich filed May 17, 1938.

(15) Order to show cause filed June 2, 1938.

(16) Statement that order to show cause filed June 2, 1938 and supporting affidavit were duly served on attorneys for appellees.

[fol. 561] (17) Transcript of hearing on June 28, 1938.

(18) Order denying complainants' application to take further testimony filed June 28, 1938.

(19) Order denying offer of formal proof by witnesses as to amount in controversy filed June 28, 1938.

(20) Findings of fact and conclusions of law filed June 28, 1938.

(21) Complainants' proposed findings of fact and conclusions of law filed June 28, 1938.

(22) Decree of dismissal filed June 28, 1938.

(23) Petition for appeal.

(24) Assignment of errors.

(25) Order allowing appeal.

(26) (4) A copy of the docket entries in the District Court.

(27) Citation on appeal.

[fol. 562] Dated September 6, 1938.

Thomas G. Haight, Louis D. Frohlich, Herman Finkelstein, Counsel for Appellants, Gene Buck, Individually and as President of The American Society of Composers, Authors and Publishers, Carl Fischer, Inc., G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, 25th Floor, 1450 Broadway, New York City.

[fol. 563] AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
County of New York, ss:

Before Me, the undersigned authority, personally appeared Herman Finkelstein, Counsel for Complainants, who being first duly sworn deposes and says, that he did on the 6th day of September, 1938, serve on: Alfred J. Schweppe and McMicken, Rupp & Schweppe, Attorneys for Appellees Phil H. Gallagher, Cliff Yelle, Ernest N. Hutchinson, G. W. Hamilton, B. Gray Warner, Harry H. Johnston, Ralph E. Foley, A. W. Swanson, H. W. Covalt, Smith Troy, Paul O.

Manley, John D. Evans, Glenn L. Bean, Sam M. Driver in the above entitled cause, and upon Clarence C. Dill, Kenneth C. Davis and Leo Teats, Attorneys for Appellee K. M. O. Inc., and upon Clark R. Belknap, Attorney for Appellee John G. Lockhart in the above entitled cause, copies of Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed Pursuant to Rule 13 of the Rules of the Supreme Court, by depositing in the United States Post Office at New York City, New York, a copy of the foregoing papers, same being in enve-
[fol. 564] lopes addressed to:

Alfred J. Schweppe and McMicken, Rupp & Schweppe, Esqs., 657 Colman Building, Seattle, Washington.

Clarence C. Dill, Esq., Kenneth C. Davis, Esq., and Leo Teats, Esq., % Leo Teats, Esq., Fidelity Bu' ng, Tacoma, Washington.

Clark R. Belknap, Esq., % Law Library, County-City Building, Seattle, Washington.

said envelopes being securely sealed and with sufficient postage thereon to insure their delivery at destination.

Herman Finkelstein, Counsel for Complainants.

Sworn to and subscribed before me this 6th day of September, 1938. Belle G. Balatow, Notary Public. Queens Co. Cl'k's No. 66, Reg. No. 14. N. Y. Co. Cl'k's No. 132, Reg. No. 0B117. Kings Co. Cl'k's No. 222, Reg. No. 310. Bronx Co. Cl'k's No. 31, Reg. No. 113B40. Commission Expires March 30, 1940.

[fol. 565] [File endorsement omitted.]

Endorsed on cover: File No. 42,814. W. Washington, D. C. U. S. Term No. 329. Gene Buck, Individually and as President of the American Society of Composers, Authors and Publishers, et al., Appellants, vs. Phil H. Gallagher, Individually and as State Treasurer of the State of Washington, et al. Filed September 7, 1938. Term No. 329, O. T., 1938.

FILE COPY

FILED

SEP 7 1938

CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 329

H. [illegible] BUCK, Individually and as President of the American Society of Dowsers, Authors and Publishers, et al.,

Appellants,

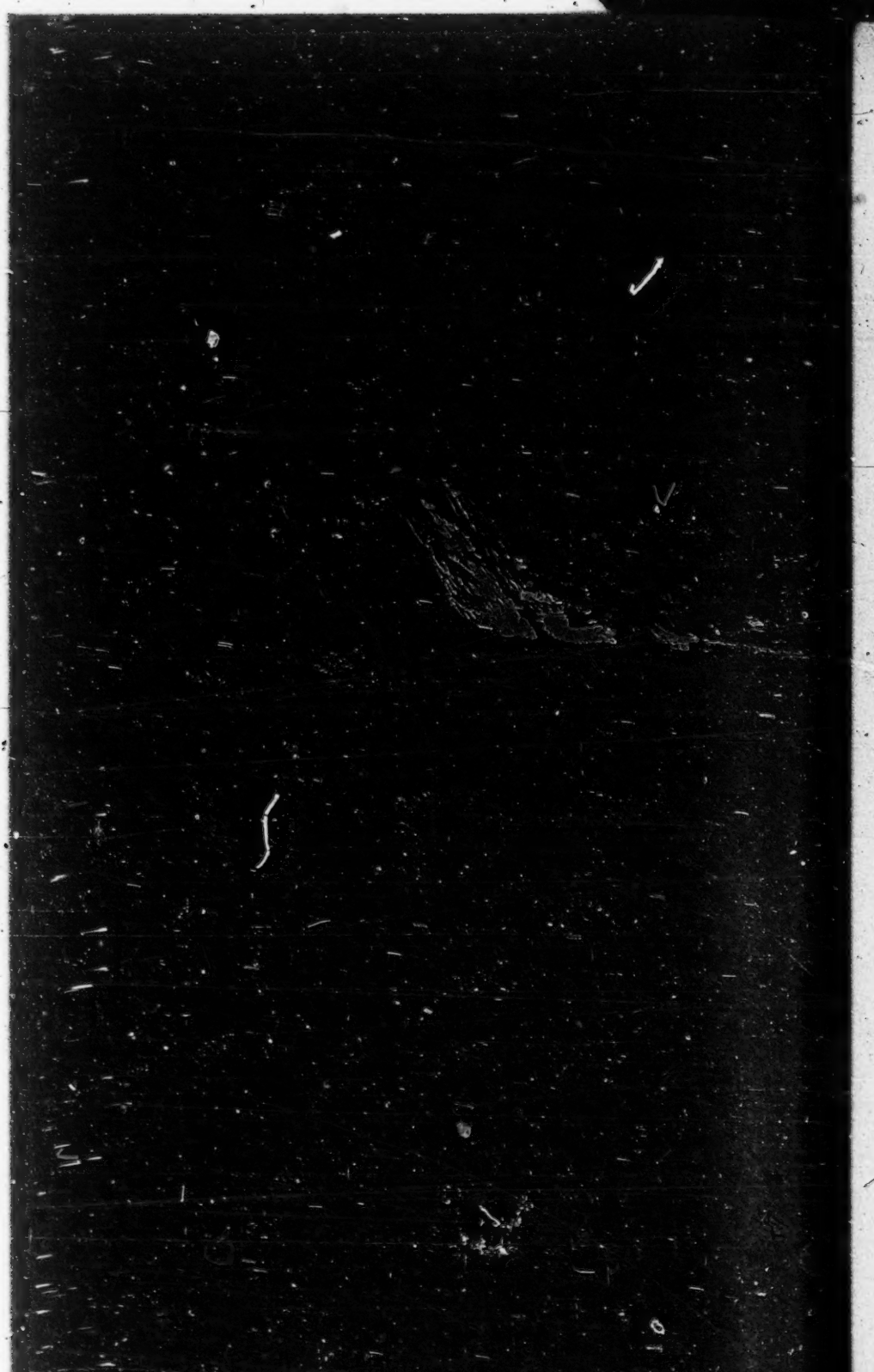
vs.

PHIL H. GALLAGHER, Individually and as State Treasurer of the State of Washington, et al.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

STATEMENT AS TO JURISDICTION.

THOMAS G. HAMERT,
LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
H. W. HAUGLAND,
Counsel for Appellants.



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UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

In Equity.

No. 606

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL., *Complainants,*

vs.

OTTO CASE, AS STATE TREASURER OF WASHINGTON, ET AL., *Defendants,*

K. M. O., INC., A CORPORATION, *Intervening-Defendant,*

JOHN G. LOCKHART, *Intervening-Defendant.*

STATEMENT AS TO JURISDICTION.

(a) The Statutory Provisions Sustaining the Jurisdiction.

The complainants rely upon Judicial Code, Sec. 238 (U. S. C., Tit. 28, Sec. 345) and Judicial Code, Sec. 266 (U. S. C., Tit. 28, Sec. 380), respectively, as amended, as sustaining the jurisdiction of the Supreme Court of the United

States to review the above entitled cause upon appeal, the decree appealed from having been made by a specially constituted three-judge court.

(b) The Statute of the State of Washington, the Validity of Which Is Involved.

The Statute of the State of Washington, the validity of which is involved is the Act of March 19, 1937, being Chapter 218 of the Laws of Washington, 1937. (Session Laws, 1937, Chapter 218, pp. 1070 to 1085, inclusive). A copy of this Statute is hereto annexed as Appendix "A" and will be referred to herein as the "State Statute". Its provisions are summarized below.

(c) The Order Granting Interlocutory Injunction Sought to Be Reviewed.

The decree and order appealed from were dated and entered June 28, 1938. The petition for appeal was presented August 1, 1938.

(d) The Nature of the Case and of the Rulings of the Court.

This action was brought by several owners of copyrighted musical compositions in their individual capacities as well as in their joint capacities as members of the American Society of Composers, Authors and Publishers (hereinafter referred to as the "Society") [1] to enjoin enforcement of a

[1] This Society is an unincorporated association consisting of 1,000 composer and author members and 123 publisher members. All members of the Society grant it for limited periods of time the exclusive right to license the public performance for profit of their copyrighted musical compositions. The Society in turn issues licenses to users on the joint behalf of all its members. Its rights have been the subject of many adjudications. (*Buck* v. *Elks Lodge, Inc.*, 83 F. (2d) 201 (C. C. A. 2); *Buck* v. *Jewell-LaSalle R. Co.*, 283 U. S. 191; *Jewell-LaSalle R. Co* v. *Buck*, 283 U. S. 202; *Harms* v. *Cohen*, 279 Fed. 276, 279-81 (E. D. Pa.); *174th St. & St. N. Amusement Co.* v. *Marwell*, 169 N. Y. Supp. 895.)

Statute of the State of Washington (hereinafter referred to as the "State Statute") on the ground that such Statute is in conflict with the copyright provisions of the Federal Constitution (Art. I, Sec. 8, Clause 8) and the Copyright Act of 1909, as amended, enacted thereunder (Act of March 4, 1909, 35 Stat. L. pp. 1075-1088 as amended; U. S. Code, Tit. 17), and that it deprives complainants of their property without due process of law, and denies equal protection of the laws.

The verified bill of complaint, motion for temporary injunction and supporting affidavits were filed May 28, 1937. The motion for temporary injunction was heard pursuant to court order before Hon. Bert Emory Haney, Circuit Judge, and Hon. John C. Bowen and Hon. Edward E. Cushman, District Judges, on June 28, 1937.[2]

Almost a year thereafter, on May 9, 1938, an opinion was filed by Judge Cushman dismissing the bill of complaint and denying the interlocutory injunction on the ground "that there is no competent evidence showing that the matter in controversy exceeds, exclusive of interest and costs, $3,000.00". The court held that the affidavits were incompetent as evidence because of the motions to dismiss, and that in any event the affidavits could not be considered because the court would not "be warranted in accepting, without opportunity for cross-examination, the statement of an owner as to the value of his property unless it was a statement against interest".

At the foot of its opinion, the Court made provision for "additional orders or rulings" if desired.

Believing that the purpose of this provision was to give complainants an opportunity to present oral proof in support of their averments as to jurisdictional amount, they

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[2] At the hearing on June 28, 1937, the petitions of K. M. O. Inc. and John G. Lockhart to intervene were granted and they, as well as the original defendants, filed motions to dismiss. No answer has been interposed by either the defendants or the intervening defendants.

applied for an order permitting them to give such testimony in open court or by deposition. As a manifestation of their good faith complainants, pursuant to an order to show cause, produced in open court in Tacoma, Washington, three witnesses who journeyed from New York City, and one from Los Angeles, including the president, chairman of the administration committee and a director of the Society whose testimony was offered to support the averments in the bill and affidavits, and to give defendants' counsel ample opportunity for cross-examination.

The learned court below refused to permit those witnesses to testify and thereupon dismissed the bill and denied the interlocutory injunction for failure to show the requisite jurisdictional amount.

Complainants contend first, that their bill of complaint, both alone and in conjunction with the supporting affidavits, amply alleges the necessary facts as to the existence of the jurisdictional amount, and secondly, that if there be any doubt as to the truth of the facts therein stated, the Court erred in denying to complainants an opportunity to establish the facts by examination of witnesses in open court.

(e) Cases Sustaining the Jurisdiction of the Supreme Court of the United States.

Interstate Busses Corp. v. *Blodgett*, 276 U. S. 245, 249;
Shannahan v. *United States*, 82 L. Ed. 740 (Adv. Sheets, Apr. 25, 1938);
Gully v. *Inter-State Natural Gas Co.*, 292 U. S. 16, 19.

(f) Summary of Provisions of State Statute.

(Ch. 218, Washington Sessions Laws, 1937, p. 1070.)

The State Statute directly affects complainants' copyrighted works in the following way:

1. Performance of copyrighted works without the consent of the owner is made unlawful (Section 2).

2. The combination within or without the State by two or more persons owning copyrights for the purpose of fixing prices for the use of their copyrighted works or for the purpose of collecting copyright royalties, or of issuing blanket licenses in the State for the right to commercially use their separate copyrighted works is unlawful (Section 3).

3. Notwithstanding the provision making it unlawful for two or more persons to combine as aforesaid, such persons may combine if they issue licenses "on rates assessed on a per piece system of usage", and provided further, that rates assessed on such per piece basis are not in excess of those charged by any group in any other State (Section 3).[4]

4. A single sale of the right of public performance for profit within or without the State, bars all copyright owners, whether members of a combination or not, from thereafter restricting the use of their copyrighted works (Section 3).[5]

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[3] This section merely does lip service to the Federal Copyright Law. In the first place, the enforcement of that law is delegated to the Federal Government exclusively under Article I, Section 8, Clause 7 of the Federal Constitution. In the second place, the subsequent provisions of the State Statute expressly authorize performance of copyrighted works without the consent of the copyright owners.

[4] It is complainants' contention that this section is a direct interference with their rights as copyright owners to determine the prices and the conditions under which their works may be performed, that it is unworkable and in effect, confiscates their copyrights as well as nullifies existing contracts between the complainant Society and its members, and between the complainant Society and 528 commercial users of music in the State of Washington.

[5] Since there can be no right to issue licenses unless the licenser has the right to restrict authors from using the copyrighted work, this clause bars complainants from issuing licenses in the State of Washington. All the members of the Society, including the complainants, have sold to the Society the exclusive right to the use of their copyrighted works in public performance for profit until December 1, 1940. Under the State Statute, they are therefore barred from further restricting such performances.

5. All copyright owners who combine "*whether for lawful purpose or otherwise*" must file annually under oath with the Secretary of State of the State of Washington two copies of a complete list of all their copyrighted works, "whether musical or dramatic or of any other classification", stating the date each separate work was copyrighted, the name of the author, the date of any assignment of the work or of any interest therein, the name of the publisher, the name of the present owner, together with the addresses and residences of all parties who have at any time had any interest in such copyrighted work (Section 4). The alleged purpose of this section is that all users in the State of Washington may know the rights and titles to the copyrighted works claimed by such persons, and to enable such users to avoid using copyrighted compositions (Section 5).*

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* The Copyright Law itself amply safeguards all users against innocent infringement by providing that every copy of the copyrighted work must bear a notice of copyright; that copies must be deposited in the Office of the Register of Copyrights; that the copyright notice must state the name of the proprietor and the year in which copyright was secured (17 U. S. C., Sections 9, 12, 18). Assignments of copyrights must be recorded with the Register of Copyrights (17 U. S. C., Sections 42-46). The Register of Copyrights keeps a full index of all copyright registrations and assignments which is printed at periodic intervals, furnished to all parties desiring them at a nominal price (17 U. S. C., Sections 56, 57). The record books of the copyright office are open to public inspection. The State Statute sets up a new system of registration distinct from and in conflict with that set up by Congress.

The information required to be filed has no possible relation to any public interest of the State of Washington and its purpose can only be to harass and annoy complainants and to make it so expensive and impossible to comply with the State Statute as to cause complainants to abandon any attempt to enforce and protect their copyrights in the State of Washington.

A very likely reason for this requirement is that the list would make it simple for the State of Washington to execute an involuntary assignment to itself, under Section 9 of the Statute, of all of complainants' copyrighted works without going to the necessary expense of examining the copyright entries in the office of the Register of Copyrights in Washington, D. C.

6. These lists must be filed even if the copyright owners affected are not doing business in the State of Washington so long as renditions of their copyrighted works may be originating from a point outside the State and may be heard within the State (Section 6).[7]

7. The production, creation and commercial use of copyrighted music within the State of Washington even though originating from a point without the State, is declared to be affected by the public interest in such Statute (Section 7).

8. Copyright owners who fall within the condemnation of the statute are denied the right to sue in the Federal courts in that suits for infringement of copyright or threats of such suits are prohibited; the copyrights of offenders are given a fictitious legal *situs* within the State of Washington (Section 7). If such persons issue licenses "either from within or from without the State", they are deemed to be doing business within the State of Washington.

9. Detecting infringements and notifying users of such infringements are referred to in the Statute as "the business of spying upon and the warning of users" (Sec. 8). Such conduct on the part of copyright owners "in addition to the presence within the State of such persons, * * * shall be *conclusive* evidence that such combinations and persons, even though non-residents, have accepted the privileges of doing business within this State" (Sec. 8).

10. If any agent, attorney, representative or investigator of any such copyright owner uses any privileges available

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[7] All complainants' works have been heard within the State at one time or another and there is no way of preventing performances of their works by means of radio broadcasting from crossing the borders of the State of Washington and being heard within that State. In fact, the interstate nature of such broadcasts is the very foundation for the Federal Communications Act.

to a citizen of the State of Washington, the copyright owner is deemed to have accepted all the provisions of the Statute; his licensees are deemed aiders and abettors, and he is deemed to have appointed the Secretary of State of the State of Washington as his attorney upon whom process may be served (Sec. 8).

11. If any attempt is made by such copyright owners to evade or render ineffectual the enforcement of the Statute, injunction proceedings will be commenced against them in the State courts by service upon the Secretary of State, and a receiver will be appointed of all their copyrighted works and property, tangible or intangible, regardless of the actual *situs* of their property. The receiver is directed to seize the copyrighted works of all such owners "including all of the rights to suits for infringement and damages in both State and Federal courts, and all choses in action and all sums due on contracts and licenses" (Sec. 9).[5]

12. Upon any attempt of such copyright owners to withdraw their copyrighted works from the State, the receiver must compile a list of all their copyrighted works which have been used in the State (which include practically all of their works); and the court must convene a so-called Anti-Monopoly Board, which board must determine and fix a rate that the receiver shall charge for the single and separate public performance for profit of each copyrighted work of the defendants "on a per piece basis * * * of

[5] In other words, if complainants should decide that in view of the cost of complying with the Statute (which cost will exceed $300,000) as contrasted with the relatively small amount secured from the licensing of their works in the State of Washington ($60,000 annually), and should prefer to abandon the issuing of licenses and to treat all persons performing their works as infringers, they will be unable to sue for infringement in the Federal Courts because all right to sue for infringement will have been taken over by the receiver appointed in a manner which offends the constitutional provisions of due process and equal protection of the laws.

o much money per each time a piece of music is played or sed in a public performance for profit" (Sec. 9).

13. Failure to appear in said court proceedings for a pe-iod of one year, results in the escheat and forfeiture to the State of Washington of all their copyrighted works, and the xecution of an involuntary assignment of all the legal and quitable titles to all of the copyrighted works to the State f Washington to be filed with the Register of Copyrights t Washington, D. C. (Sec. 9).

14. If complainants, who are non-residents, should ap-ear in the State courts for the purpose of contesting the alidity of the constructive service upon them in the form utlined in the Statute, such special appearance shall "be leemed to be as a general appearance even though the proc-ss may have been insufficient" (Sec. 10).[9]

15. The penalties against any offending copyright own-rs, as well as against any of their licensees, agents, repre-entatives, investigators and attorneys is a fine not exceed-ng $500 or imprisonment for not more than six months, r both (Sec. 11).[10]

(g) The Substantial Questions Involved.

This appeal involves the following substantial questions:

Question 1. Does the bill of complainants alone disclose hat the value of the matter in controversy is in excess of

[9] Strangely enough this section has a proviso that it shall not be con-trued as denying complainants of their rights without due process of aw (Sec. 10).

[10] The remaining sections of the Statute provide that if any portion of he Act is declared unconstitutional, such holding shall not affect the valid-ty of the balance of the Statute (Sec. 12); and that where more than one njunction suit is instituted in different counties, orders may be issued gainst the defendants in each of the counties, but if there is a receiver-hip and the defendants are the same the actions are to be consolidated n one county (Sec. 13).

$3,000, exclusive of interest and costs, and, incidentally, do the affidavits presented on the application for the preliminary injunction support the bill in that respect?

This action is brought on behalf of all members of the complainant Society (an unincorporated association) to redress an injury to property rights in which all such members have a joint and common interest (Compl., pars. 1, 2, 18, 19, Exs. "B", "C" and "D", annexed to compl.).[11]

The matter in controversy between the complainant Society and the defendants exceeds the value of $3,000 as shown by the following allegations of the bill:

(1) The Statute interferes with and destroys 528 contracts between the Society and users in Washington, from whom the Society, on behalf of all its members jointly, has received and would continue to receive, but for the Statute, $60,000 annually, which sum has been lost to it (Compl., pars. 24, 26, Exs. "F", "G" and "H"). The Society has not received any payments since the effective date of the Statute—a period of more than one year (Offer of Proof, Hearing, June 28, 1938, pp. 15, 16; Compl., pars. 27, 28, 35-A, 36).[12]

(2) It would cost the Society in excess of $300,000 to compile a list containing the information required by the Statute as to the copyrights of its own members, and interests therein, and an additional $50,000 as to the copyright

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[11] Equity Rules 37, 38; *Smith* v. *Swormstedt*, 16 How. 288, 302-3; *Beatty* v. *Kurtz*, 2 Pet. 566, 584-5; *Local Union No. 497* v. *Joplin Ry. Co.*, 287 Fed. 473, 475 (C. C. A. 8); *Buck* v. *Elm Lodge*, 83 F. (2d) 201 (C. C. A. 2).

[12] The amount in controversy is $60,000—not the aliquot ultimate interest of each of the members of the Society therein. *Troy Bank* v. *Whitehead & Co.*, 222 U. S. 39, 40; *Local Union No. 497* v. *Joplin Ry. Co.*, 287 Fed. 473, 475 (C. C. A. 8); *Haynes* v. *Fraternal Aid Union*, 34 F. (2d) 305, 308 (D. C. Kans.); *Shields* v. *Thomas*, 17 How. 3, 4. The value of these contracts is the amount involved. (*Texas & Pac. Ry.* v. *Gentry*, 163 U. S. 353, 361.)

of members of foreign societies, whose copyrights the Society licenses under reciprocal contracts (Compl., pars. 25, 26).

The affidavits further show:

(1) If the Society fails to comply with the Statute all its contracts and interests in copyrights throughout the United States will be seized and escheated and forfeited to the State of Washington. It will lose $3,200,000 as its annual license fees from radio broadcasting stations alone (Aff. of Buck, p. 38).

(2) It would cost the Society annually in excess of $2,000,000 to attempt to conform its operations throughout the United States to the requirements of the State Statute—an undertaking so prohibitive as to either force the Society to disband or to make license fees so absolutely exorbitant as to make it impossible for the establishment to operate (Aff. of Buck, pp. 49-55). Unless the Society changes its operations outside the State of Washington to conform with the Statute's requirements it will obviously be guilty of violating the Statute.

The matter in controversy between each of the *individual* complainants and the defendants exceeds the value of $3,000 as shown by the following:

(1) They will lose the amounts which they now receive from the Society, since the Statute compels them to surrender their membership. The contracts of each do not expire until December 31, 1940. On the basis of past annual receipts in excess of $50,000 each, complainants Carl Fischer, Inc., G. Schirmer, Inc., and Irving Berlin, Inc., will each suffer a net loss in excess of $200,000 (Aff. of W. Fischer, p. 3; S. H. Bornstein, pp. 3-4; G. Schirmer, pp. 3-4; Compl., par. 36); complainant Nevin will lose in excess

of $12,000 (Aff. of A. P. Nevin, p. 2); complainant Taylor will lose in excess of $15,000 (Aff. of D. Taylor, p. 3); complainant Bartlett will lose in excess of $25,000 (Aff. of E. H. Bartlett, p. 2).

(2) Compliance with the requirements of the Statute would cost each of the complainants, Carl Fischer, Inc., G. Schirmer, Inc., and Irving Berlin, Inc., annually in excess of $75,000, being allocated as follows: $25,000 for filing the requisite lists, $25,000 in attempting to fix prices per piece for various uses of different copyrighted compositions in the hundreds of establishments in Washington performing the respective complainants' copyrighted music publicly for profit, and $25,000 to detect and sue for infringement—all of which expenses are presently unnecessary under the system of issuing blanket licenses (Compl., par. 8; aff. of S. H. Bornstein, pp. 5-12; aff. of W. S. Fischer, pp. 2-4; aff. of G. Schirmer, pp. 2-4). Compliance with such provisions would cost each of the other complainants individually in excess of $5,000 (Affs. of A. P. Nevin, p. 9; D. Taylor, p. 4; E. H. Bartlett, p. 6).

(3) If complainants fail to comply with the Statute, each of them will suffer the forfeiture of all copyrights and interest therein to the State of Washington in a suit wherein process will be served on a fictitious "agent", based on fictitious definitions of "doing business" and of "situs" of copyrights. The value of copyrights owned by complainants Carl Fischer, Inc., G. Schirmer, Inc., and Irving Berlin, Inc., is in excess of $1,000,000 each (Compl., par. 8; aff. of W. S. Fischer, pp. 3-4; S. H. Bornstein, pp. 3-4; G. Schirmer, pp. 1-4). Each of the other complainants has interests in copyrights including renewal rights valued in excess of $100,000, all of which will be confiscated (Compl., pars. 11, 12, 13 and 14). In addition they will be fined not exceeding $500 and/or imprisoned not more than

x months for each offense resulting in penalties of $250,-
0 against each complainant who attempts to assert his
nstitutional rights against the 528 users in Washington.

As a matter of fact, the individual complainants have
ither the resources, funds, organization nor ability to pro-
t their copyrighted musical works against infringement
d if they are deprived of the right to combine, they will
ve to surrender and forfeit the right of public perform-
ce for profit which is given to them under their respec-
e copyrights (Compl. par. 21).

It seems clear that facts showing the necessary jurisdic-
nal amount are amply alleged as to each of the com-
ainants individually, as well as jointly in their capacities
members of the Society. In any event it is sufficient
the necessary jurisdictional amount be shown as to any
e complainant. (*Grosjean* v. *American Press Co.*, 297
S. 233, 241-2.)

Question 2. Did the court below have jurisdiction regard-
ss of the amount involved in view of the substantial claim
at the State Statute denies equal protection of the laws
d denies to complainants certain privileges and immuni-
s of citizens of the United States?

Where such a claim is made the Federal courts have juris-
ction regardless of the value of the matter in controversy.
ud. Code, Sec. 24, subd. 14 (U. S. C. Tit. 28, Sec. 41);
ich v. *Truax*, 219 Fed. 273, 283, aff'd 239 U. S. 33 (1915).)
The penalties imposed on complainants by the Statute
sult in denying them equal protection of the laws by de-
iving them of the right of free ingress into the State of
ashington and egress therefrom, as well as the right to
e for infringement of copyright in the Federal courts.
aul v. *Virginia*, 8 Wall. 168, 180; *Terral* v. *Burke Con-*
ruction Co., 257 U. S. 529, 532; *Harrison* v. *St. L. & San*
ancisco R. R., 232 U. S. 318, 328.)

In singling out for the condemnation of the Statute, one class of owners of intellectual property (namely owners of copyrighted musical compositions) and exempting all others engaged in exactly the same business the Statute denies equal protection of the laws. (*Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 562.)

The sole object of the Statute is to oppress and discriminate against these complainants in favor of their 528 licensees in the State of Washington. This is a proper subject of judicial inquiry. It results in denying equal protection. (*Dobbins* v. *Los Angeles,* 195 U. S. 223, 240; *McFarland* v. *American Sugar Co.*, 241 U. S. 79, 86.)

Question 3. Is there a substantial claim that the Statute violates Article I, Section 8, Clause 8 of the Constitution of the United States?

Article I, Sec. 8, Clause 8 of the Constitution provides that:

> "The Congress shall have power: * * * To promote the progress of science and useful arts, by securing for limited times to authors and inventors the *exclusive right* to their respective writings and discoveries."

Congress has defined such exclusive rights by granting to the owner of a copyright in a musical composition the exclusive right:

> "(a) To print, reprint, publish, copy and read the copyrighted work * * *
>
> "(e) To perform the copyrighted work publicly for profit if it be a musical composition and * * * to make * * * any form of record in which the thought of an author may be recorded and from which it may be read or reproduced * * *" (Act of Mar. 4, 1909, 17 U. S. C., § 1).

The complainants, upon securing their respective copyights were granted *exclusive* rights which even the United States may not invade. (*United States* v. *Dubilier Conenser Corp.*, 289 U. S. 178, 186, 189; *James* v. *Campbell*, 104 . S. 356, 358; *United States* v. *Bell Telephone Co.*, 167 . S. 224, 249-50.)

A fortiori, the State of Washington may not invade these xclusive rights in the manner attempted by the State tatute.

Among the exclusive rights granted to copyright owners s the right of public performance for profit which includes erformances by live musicians in hotels, restaurants and ight clubs (*Herbert* v. *Shanley*, 242 U. S. 591), performnces by means of radio broadcasting or re-broadcasting *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191), and by neans of a radio receiving set installed in each room of a otel operated from a master-controlled set (*Society of European S. A. and C., Inc.* v. *New York Statler Hotel, Inc.*, 9 F. Supp. 1 [1937, S. D. N. Y.]).

The State Statute deprives copyright owners of the right o license the re-broadcasting of their works as well as the ublic performance of their works by means of radio-receivng sets, thus setting at naught rights granted by the Conress under the United States Copyright Law and Federal onstitution.

This is accomplished by the last proviso of Section 3 of he Statute which prevents copyright owners from restrictng the use of their works after a license for a public perormance has once been given within or without the State.

It is well settled, that copyright owners cannot be comelled to grant licenses except upon their own terms and at rices fixed by such owners. (*F. A. D. Andrea, Inc.*, v. *Radio Corp. of America*, 88 F. (2d) 474, aff'g 14 F. Supp. 26 (C. C. A. 3.)

The several States may not pass laws to the contrary. (*Henry Bill Pub. Co.* v. *Smythe*, 27 Fed. 914, 917 (S. D. Ohio).)

The State Statute ignores the very foundations of the Copyright Law by requiring the following:

(a) Requiring licenses to be issued on a so-called "per piece system of usage" (Section 3);

(b) Loss of the right to restrict the use of their copyrighted works after the right to a single use has been sold (Section 3);

(c) Filing a list of prices for all complainants' copyrighted works resulting in the granting of involuntary licenses to all users in the State of Washington (Section 4);

(d) Compelling complainants to submit to prices fixed by a so-called Anti-Monopoly Board or having all their copyrights confiscated if the prices charged by complainants are greater than those charged in any other State by any group of copyright owners (Sections 3 and 9);

(e) Compelling complainants to refrain from notifying infringers of their disregard of the Copyright Act, threatening to sue and suing for infringement in the Federal courts (Section 7);

(f) Compelling complainants to refrain from employing investigators to detect infringement and from licensing broadcasts in other States except at the risk of having all their copyrights regarded as having a *situs* in the State of Washington and being compelled to submit to the jurisdiction of the Washington courts and having their contracts ultimately escheated to such State (Sections 8 and 9);

(g) Requiring complainants to waive the right to challenge the jurisdiction of the Washington State courts over their persons (Sections 8, 9 and 10);

(h) Compelling complainants to surrender all their rights under existing contracts with users in the State of Washington by making it a crime to collect monies due thereunder (Sections 8, 9 and 11).

Unless complainants are willing to surrender all these rights, they are denied the privilege of enjoying the rights granted to them by the United States under their respective copyrights pursuant to the Constitution and the Acts of Congress thereunder.

Question 4. Does the State Statute deprive complainants of their property without due process of law?

The State Statute so defines the phrase "doing business", as to subject complainants to the jurisdiction of the State courts even though they do not transact any business within the State, do not reside there, and have no agent within the State (Sections 7 and 8). These fictitious definitions of "doing business" are made the basis of jurisdiction *in personam* of complainants so that the State may confiscate their properties and subject them to the penalties and forfeitures of the Statute by reason of acts over which the State of Washington has no possible jurisdiction as a matter of law. (*Chipman Ltd.* v. *Jeffery Co.*, 251 U. S. 373, 379; *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727; *Minnesota M. Assn.* v. *Benn*, 261 U. S. 140, 145; *Old Wayne Life Ass.* v. *McDonough*, 204 U. S. 8; *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79, 87; *Bank of America* v. *Whitney Central Nat. Bank*, 261 U. S. 171; *Caledonian Coal Co.* v. *Baker*, 196 U. S. 432, 444.)

Investigation of copyright infringements within the State made *conclusive* evidence of "doing business" therein (Section 8). This ignores the fact that the *Federal* grant of a copyright is nullified unless the copyright-owner is permitted to investigate infringements. It would be just as

logical to assert that the transportation of merchandise across the borders of a State by an interstate carrier subjects the latter to the jurisdiction of the State courts as one doing business within the State.

Similar fictions are employed in attributing a Washington *situs* to complainants' copyrights regardless of complainants' domicile and residence if complainants shall in any way violate the Statute, or if their copyrighted works are used or sold for public performance *outside* the State, if intended to be heard within the State from a point outside the State. It is well known that all radio programs from adjoining States, and even from distant States and from Canada, and on short-wave from foreign countries are intended to be heard within the State of Washington.

The excuse for giving such copyrights a Washington *situs* is indeed thin and transparent. It is an attempt to render the enjoyment of a Federal right impossible by arbitrarily creating a fictitious legal *situs* incompatible with the existence of the right. (*Harrison* v. *St. Louis & San Francisco R. R.*, 232 U. S. 318, 331.)

The State Statute by creating these arbitrary conclusive presumptions and fictitious definitions, deprives complainants of the right to show that they are not in fact doing business in the State of Washington; that their copyrights actually have no *situs* in the State, and that they have not so acted as to give the courts of Washington any express or implied consent to adjudicate their property rights. In denying complainants a fair opportunity to establish the true facts, the Statute violates due process. (*Manley* v. *Georgia*, 279 U. S. 1, 6; *Heiner* v. *Donnan*, 285 U. S. 312, 328; *Morrison* v. *California*, 291 U. S. 82, 90.)

The indefiniteness of the Statute in view of its drastic penalties, likewise results in denying due process. (*Connally* v. *General Const. Co.*, 269 U. S. 385, 391, 393-5; *Cline* v. *Frink Dairy Co.*, 274 U. S. 455, 457; *United States* v. *Cohen*

Grocery Co., 255 U. S. 81; *A. B. Small Co.* v. *American Sugar Ref. Co.*, 267 U. S. 233.)

Question 5. Does the State Statute interfere with treaties between the United States and foreign countries respecting copyrights and with proclamations of the President of the United States recognizing the existence of certain reciprocal conditions between the United States and foreign countries in respect of copyrights?

Section 8 of the Copyright Law (35 Stat. L. 1075) provides as follows as to recognition of copyrights by citizens and subjects of foreign States:

> "(b) When the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection substantially equal to the protection secured to such foreign author under this Act or by treaty; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto.
>
> "The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time, as the purposes of this Act may require."

Pursuant to this provision a number of treaties have been entered into between the United States and foreign countries and there have been 62 Presidential proclamations establishing reciprocity between the United States and foreign countries.

Such reciprocity has been established on the basis of copyright laws as enacted by Congress. If each of the States may modify those laws the basis upon which these

treaties have been entered into and the proclamations issued will be entirely destroyed.

The Society has reciprocal agreements with similar societies existing in practically every civilized foreign country of the world. These agreements are made pursuant to the treaties and proclamations mentioned above. Since the State Statute nullifies these contracts it interferes with rights protected by treaties which are the supreme law of the land.

(h) The Abuse of Discretion in Denying the Interlocutory Injunction.

The special statutory district court in denying the interlocutory injunction abused its discretion in refusing to consider complainants' application on its merits and in refusing to permit complainants to offer testimony in open court or by depositions in support of the jurisdictional allegations.

THOMAS G. HAIGHT,
LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
H. W. HAUGLAND,
Counsel for Complainants.

APPENDIX "A".

In the House. By Mr. Keith.

HOUSE BILL NO. 480.

STATE OF WASHINGTON, TWENTY-FIFTH REGULAR SESSION.

Read first time February 11, 1937, ordered printed and referred to Judiciary Committee.

AN ACT

In aid of the Federal Copyright Laws, to assist in effectuating their true intent and their enforcement in the State of Washington by removing and declaring illegal certain monopolistic abuses and activities wrongfully practiced under the guise of copyrights within the state by price fixing combinations, monopolies, and pools; to enforce the Washington constitutional provisions prohibiting price fixing monopolies and combinations in restraint of commerce and trade; providing penalties for combining rights granted by the copyright laws where the effect of such combination results in the use of copyright privileges as instrumentalities of oppression and extortion within the state in violation of constitutional provisions, and encouraging the rendition, creation and production of copyrighted works among the school children and citizens of the State of Washington; encouraging the marketing and acceptance of copyrighted works, created by the citizens of this state; repealing certain acts; creating a State Anti-Monopoly Board for a particular function to be exercised only in the event of abuses and violations hereof; defining its duties, and the jurisdiction and duties of courts of record, the duties of the prosecuting attorneys, county auditors, the state treasurer and the secretary of state; and providing for the appointment of a receiver in certain instances; defining certain terms; providing for service of process on non-residents; prohibiting certain acts; and providing penalties for violation hereof and repealing section 2690 of Remington's Revised Statutes.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. Section 2690 of Remington's Revised Statutes is hereby repealed.

SEC. 2. It shall be unlawful for any person who, without the consent of the owner thereof, shall cause to be publicly performed for profit any dramatic composition, or dramatic musical composition commonly called an opera, or other copyrighted works, or any substantial part thereof, which has been copyrighted under the laws of the United States, or for any person to knowingly participate in the performance or representation of any substantial part thereof, or by knowingly selling a substantial copy of any substantial part thereof.

SEC. 3. It shall be unlawful for two or more persons holding or claiming separate copyrighted works under the copyright laws of the United States, either within or without the state, to band together, or to pool their interests for the purpose of fixing the prices on the use of said copyrighted works, or to pool their separate interests or to conspire, federate, or join together, for the purpose of collecting fees in this state, or to issue blanket licenses in this state, for the right to commercially use or perform publicly their separate copyrighted works: *Provided, however,* Such persons may join together if they issue licenses on rates assessed on a per piece system of usage: *Provided, further,* This act shall not apply to any one individual author or composer or copyright holder or owner who may demand any price or fee he or she may choose for the right to use or publicly perform his or her individual copyrighted work or works: *Provided, further,* Such per piece system of licensing must not be in excess of any per piece system in operation in other states where any group or persons affected by this act does business, and all groups and persons affected by this act, are prohibited from discriminating against the citizens of this state by charging higher and more inequitable rates per piece for music licenses in this state than in other states: *Provided further,* Where the owner, holder, or person having control of any copyrighted work has sold the right to the single use of said copyrighted work, where its sole value

is in its use for public performance for profit, and has received any consideration therefor, either within or without the state, then said person or persons shall be deemed to have sold and parted with the right to further restrict the use of said copyrighted work or works.

SEC. 4. In the event two or more persons holding separate copyrighted musical works, or any rights flowing therefrom, whether by assignment, agency agreements, or by any form of agreement, pool their interests, or combine, or conspire, federate, or join together in any way, whether for a lawful purpose or otherwise, a complete list of their copyrighted works or compositions shall be filed once each year in the office of the secretary of state of the State of Washington, together with a list of the prices charged or demanded for their various copyrighted works; no payment or filing fee shall be required by the secretary of state, and said persons, corporations, or association, foreign or domestic, shall state therein under oath, that said list is a complete catalogue of the titles of their claimed compositions, whether musical or dramatic or of any other classification, and in addition to stating the name and title of the copyrighted work it shall recite therein the date each separate work was copyrighted, and the name of the author, the date of its assignment, if any, or the date of the assignment of any interest therein, if any, and the name of the publisher, the name of the present owner, together with the addresses and residences of all parties who have at any time had any interest in such copyrighted work. The secretary of state shall require two copies of said list, one of which he shall keep on file, the other shall be forwarded to the offices of the state treasurer at Olympia.

SEC. 5. The foregoing list of names and titles, provided for in the preceding section, shall be made available by the secretary of state to all persons for examination, in order that any user of copyrighted works in this state may know the rights and the titles to such copyrighted works as may be claimed by any of said combinations, pools, associations, or persons as aforesaid; said lists shall be prepared so that all persons may avoid using said copyrighted compositions, if they so desire, and may avoid conflict therewith, and

avoid committing innocent infringements of said works; and in order to further effectuate the copyright laws of the United States, the secretary of state shall, if he deems it necessary to protect the citizens of this state from committing innocent violations of the copyright laws of the United States, publish such list once each year in a newspaper of general circulation, in order that all citizens of the state may respect any and all individual rights granted by the United States copyright laws.

SEC. 6. No person, corporation, or association, domestic or foreign, whether doing business in this state as hereinafter defined or not, shall be absolved from the foregoing duty of filing said list of holdings as required in the preceding sections of this act, if their music or copyrighted works are used commercially in this state, or have been used herein, whether originating from a point within the state or from without, and as long as any rendition thereof is received or heard within the state, or is intended to be so received by the originator of any musical program: *Provided, however,* Any individual owner of a copyrighted work or works, not a party to or not connected in any way with any pool, conspiracy, combination, or groups, or association of persons, as prohibited by this act, need not file any such list.

SEC. 7. It is hereby declared that the production and creation of music and the commercial use of music and of copyrighted works within this state, whether originating at a point from within or without the state, as long as the same shall be rendered and publicly received within the confines of this state, whether mechanically or by radio communication, is a business clothed and affected with the public interest, and the adult educational advantages engendered by the public use of music and in its creation, makes this business one of public necessity, and necessary for the education and training of the youth of this state; that many abuses are practiced under a false guise of federal protection which only the state with its police power can easily and lawfully restrain, and in order to prohibit, discourage, and prevent monopolistic practices, and to prevent extortion, to encourage free bargaining between the citizens of

this state with each other and with those without the state, and in order to give greater effect to the constitutional provisions relating to monopoly and price-fixing, and in the general interest of the public, therefore, the legislature in the interest of the peace and dignity of the state, in the interest of good morals and the general welfare of the people of this state, and for greater educational advantages to the public, declares that said business shall be subject to the police power and reasonable regulation of the state government, and such police and regulating power shall be administered by the courts and other officials of this state in a manner consistent with, in aid of, and never in conflict with, the copyright laws of the United States. The provisions of this act, and the administration thereof, shall at all times effectuate the enforcement, the true intent, and meaning of the United States copyright laws in order to prevent abuses from being practiced within this state from points within or from points without the state, by any individual, corporation, or organizations, who attempt to use the federal courts as innocent instrumentalities in the furtherance of any systematic campaign or scheme designed to illegally fix prices for the commercial use of copyrighted works in this state through the use of extortionate means and terrorizing practices based on threats of suits, and an abuse of both state and federal process, all of which are declared to be in violation of this act and of the state constitution; it is further declared that any person or persons, or combines, as aforesaid, who shall violate this act shall be deemed to have used their property within this state in such a way that the same shall have acquired a legal situs, analogous to the situs of other personal tangible property within the state, even though separate from the domicile and residence of the owner: *Provided, further*, The legal situs of any copyrighted work is co-extensive about the state, and a copyrighted work used or sold for public use or public performance for profit, if intended to be heard from a point without the state or from a point within the state, is hereby declared to be a commercial commodity, and its legal situs is hereby declared to be within the State of Washington.

SEC. 8. All persons, groups, corporations, associations, foreign or domestic, violating this chapter, shall be deemed

to have been doing business within this state and amenable to the process of the state courts, when any such persons, combinations, or groups shall have issued licenses, either from within or from without the state, for the privilege of using commercially and publicly any copyrighted work or works pooled in a common group or entity, or when any of the functions of said entity, organization, pool, or combine, is or has been performed in this state; and the business of spying upon and the warning of users of the copyrighted works of such combinations, in addition to the presence within the state of such persons, and the activities of such persons or their agents at any time or occasion for the detection of infringements within this state, shall be conclusive evidence that such combinations and persons, even though non-residents, have accepted the privileges of doing business within this state, and such persons, if they abide by the provisions of this act, shall be granted the privilege of conducting business within this state in a legal manner, and may invoke the benefits of the state government and its political subdivisions in their behalf, and they may use all of the privileges available to the citizens of this state in general, and the use at any time of any general privilege available to any citizen of this state, by any of such agents, their attorneys, or representative, or investigator, or by any aider and abettor, or any non-resident person, group, entity, or combination as aforesaid, shall be deemed to be an acceptance of the provisions of this act: and all licensees of any violator of this act shall be deemed as aiders and abettors of said persons and subject to the provisions of this act unless they forthwith indicate their obedience herewith: and the acceptance of the general privileges of the State of Washington by any non-resident copyright holder or owner, or combination, defendant, or person, or organization of any kind, or entity, through an investigator, attorney, agent, representative, or through any aider and abettor as herein defined, and the acceptance by such persons of the rights, police protection, or of any general privilege conferred by the law of this state to any of its citizens, including the use of the roads and highways, or the privileges of any of its political subdivisions, as evidenced by their presence within the state at any time, shall be deemed

equivalent to and construed to be an appointment by such non-resident or non-residents, as the case may be, of the secretary of state of the State of Washington to be his or their true and lawful attorney upon whom may be served all summons and processes against him or them and growing out of a violation of this act, in which said non-resident may be involved, and said acceptance of the privileges of this state, as aforesaid, shall be a signification of his or their agreement that any summons or process against him or them which is so served shall be of the same legal force and validity as if served on him or them personally within the State of Washington. Service of such summons or process shall be made by leaving a copy thereof with a fee of two dollars ($2) with the secretary of the State of Washington, or in his office, and such service shall be sufficient and valid personal service upon any such non-resident defendant, copyright holder or owner, persons, or defendants, combination, entity, or organization, as aforesaid: *Provided,* That notice of such service and a copy of the summons of process shall be forthwith sent by registered mail requiring personal delivery, by the prosecutor bringing any action under this act, to any defendant at his last known address, and the defendants return receipt and the prosecutor's affidavit of compliance herewith are appended to the process and entered as a part of the return thereof: *Provided, further,* The court in which any action is brought may order such continuances as may be necessary to afford any non-resident defendant or groups, or entity, a reasonable opportunity to defend the action: *Provided, further,* The secretary of state shall keep a record of all such summons and process which shall show the day and time of service; and valid personal service shall thus be had on non-resident persons or individuals, entities, firms, or corporations violating this act.

SEC. 9. In the event any person, or groups of persons, or any combination or pool as aforesaid, whether a non-resident corporation, person, or an association, or domestic, refuse to abide by the provisions hereof, or attempt to evade or render ineffectual the true enforcement of any provision of this act, then the prosecuting attorney of any

county where complaint is made of any violation, shall institute injunction proceedings against said persons in the superior court, and valid personal service may be had upon any non-resident defendant as set forth in the preceding section; and the court shall enjoin all persons from violating the provisions of this act and the constitutional provisions prohibiting price fixing, monopolies, and combinations, and all copyrighted works and the public performance rights thereto when sold or used for profit are hereby declared to be a commercial commodity, and all persons, aiders and abettors, and agents, shall be enjoined by the court from aiding or furthering in any way a continuation of any violation of this act, either by the payment of money to said defendants or in any way; and if any defendant or defendants persist in defying the judgment of the court, the court shall, in order to effectuate its judgment and orders, order three (3) days' notice be given said defendant or defendants, as the case may be, by having a copy of such notice served on the secretary of state as heretofore provided if defendants are without the state, or served personally if within the state, and have the same published in some daily paper in the state of general circulation, and at the end of said period, if any defendant or defendants refuse to obey the order of the court, then the court shall appoint the county auditor as receiver for the copyrighted works and property of defendants, tangible or intangible, and of all other effects and monies derived therefrom, and the receiver shall take over and preserve the commercial rights to all of said copyrighted works, together with such other property of any defendant, combination, pool, corporation, or entity through which they are acting, that he can locate within the state, and the receiver shall administer the same under the direction of the court, and said receivership shall be considered only as an incident to the main injunction suit of the prosecutor, and for the purpose of enforcing the courts orders; the said receiver shall seize the copyrighted works of all of the copyright holders and owners in said defendant combination, including all of the rights to suits for infringement and damages in both state and federal courts, and all choses of action and all sums due on contracts and

enses, and hold the same subject to the order of the court; d all persons holding licenses or contracts with any de- ndant combination or entity, shall pay the fees and sums e thereon to the receiver for such time as the court may ed to effectuate the provisions of this act, and to compel y defendant to abide herewith: *Provided*, Any sums paid licenses violating this act shall only be continued in the urts discretion or until such time as the court can award fendants complete and full due process of law before tering a final order thereon, or until such time as a legal d equitable system of licensing can be determined accord- g to the subsequent provisions of this act: *Provided rther*, In the event any defendant or defendants attempt withdraw their said copyright works or property from e state in order to violate and render this act or the courts ders ineffectual, or to deprive the citizens of this state such commodity, or to hamper the enforcement of any pro- sion of this act, or to injure any citizen or user of music in y way, then the court shall immediately order the receiver compile a complete list of all of the copyrighted works of id defendants to show cause within ten days why they urt shall then convene the State Anti-Monopoly Board, as rein now created, consisting of the state treasurer and the ate auditor, and said board shall meet in the county where e suit is filed, and the superior judge hearing the cause all be an advisory member of said board; and said ard, of which the state treasurer shall be chairman, all have only one function, the discouragement of price- ing and monopolies, and the court shall then submit to id board the single question of the establishment of license tes for the use of those copyrighted works controlled by e defendants so proceeded against; and for the purpose aiding in the abolition of monopolies and price-fixing, d preventing violations of this act, the board shall deter- ne a fair and just rate that the receiver should charge r the single and separate public performance for profit each copyrighted work or works of said defendants, on a r piece system and basis of licensing, and the court shall t be deemed thereby to have divested itself of any of its risdiction by so doing; after determining such rate, the

said Anti-Monopoly Board shall immediately advise the receiver of its findings, and of its fair rate, and the same shall be filed of record in the cause, and the receiver may then, if said finding is approved by the court, issue licenses for the use of said music at such approved rate on a basis of so much money per each time a piece of music is played or used in a public performance for profit; that said property shall be thus administered by the receiver for a period of one year, or until such time as the defendants, or the individual copyright owners of any combination so proceeded against take oath that they will abide by the ruling of the court and the provisions of this act; and all fees and funds collected by the receiver shall be turned over to the state treasurer, and no receivers fees or attorneys fees shall be allowed, and the prosecuting attorney shall be the attorney for the receiver, and the state treasurer shall keep said money in a separate and special fund, subject to the order of the court only for whatever portion thereof that the court may order used to defray the actual expenses of the board and the receivership; at the end of one year, if the defendants and copyright owners or holders in any combination thus proceeded against, continue to wilfully disobey the courts orders, then the court shall issue an order, which shall be published in three public places, to the effect that unless the defendants obey all of the orders of the court within ten days from the date of said order, that the court will proceed to permanently deprive said defendants and each of them of their property; and the court shall then order said defendants to show cause within ten days why they should not be involuntarily compelled to assign all of their copyrighted works to the receiver forthwith, and to show cause why all of the funds as collected in the manner aforesaid from licenses, together with all of the copyrighted works including the performing rights thereto of said defendants and members of said combine, should not escheat and be forfeited forever to the State of Washington, and be subject thereafter to administration by the state in the same manner as all other personal property belonging to the State of Washington; if any of said defendants and copyright holders, or owners, do appear before the end of said ten

day period, and take oath that they will abide by the future orders of the court and the provisions of this act, then the court shall release their copyrighted works and order the state treasurer to return any and all of their money which has been received or seized: *Provided, however,* The court shall retain such jurisdiction over their persons for such time as the court may deem necessary to insure strict compliance with the terms of the courts judgment and the provisions of this act; if any of said defendants or copyright owners or holders shall ignore or refuse to obey the show cause order, aforesaid, or fail to appear at the end of ten days as ordered and abide by the courts judgment, then the court shall make an order and enter judgment to the effect that all of the copyrighted works, including the performing rights thereto, of said defendants and the members of any defendant combination, shall be construed as having been escheated and forfeited to the State of Washington, and the court shall thereupon appoint some officer of the court to execute an involuntary assignment of all the legal and equitable titles to all of the copyrighted works of each of said defendants and members of any defendant combination to the receiver, in the event the defendants or any of their members fail to execute a voluntary assignment, and the receiver shall immediately file said involuntary assignment at the United States Copyright Office at Washington, D. C.; and the court shall then order the receiver to close the estate, and turn the titles to said copyrighted works over by proper assignment from the receiver to the state treasurer of the State of Washington, who shall thereafter administer, issue licenses for the use of the same in a manner consistent with this act, and conserve the same as state personal property in his possession, and according to law; and any funds left in the state treasury from said receivership shall escheat and be forfeited to the state and become part of the general fund; *Provided, further,* The state treasurer shall make a report to the legislature on each biennium of the amount of money received from such licensing and the amount of property he has on hand through the enforcement of this act.

SEC. 10. That in the event any person, or any of the defendants, or non-residents, or non-resident copyright owners or holders, are proceeded against as herein outlined, and are served with process according to law, or any non-resident is served with process as outlined in the preceding sections of this act, and if any of said defendants, or persons, or aidors and abettors named as defendants, appear in any such proceeding by counsel or otherwise, or institute any special proceeding attacking such proceeding, or make any motion therein, either special or general, or if any of them appear to obtain the judgment of the court solely upon the sufficiency of the service of the process upon them, or upon any phase or particularity of said injunction proceedings, such special proceeding or appearance, or motion, or appearance, as the case may be, shall nevertheless be deemed as a general appearanec even though the process may have been insufficient, and said parties and defendants as may thus appear in the action, for any reason or cause, whether they seek special or affirmative relief, shall thereafter be subject to the general orders and jurisdiction of the court for all purposes, and if any of said defendants or persons appear in any court proceeding instituted to effectuate this act solely for the purpose of challenging the validity of service of process upon them they shall be deemed to have surrendered themselves and as having submitted to the general jurisdiction of the court: *Provided, however,* This section shall not be construed as denying, and no attempt shall be made at any time in any proceeding in connection with the enforcement of this act, to restrain or deny any of said defendants, resident or non-resident, copyright holders or owners, or any person, or members of any defendant combination, entity, pool, or monopoly of their rights or property without full and complete due process of law.

SEC. 11. Every person, in addition to the other penalties provided in this act, who violates or who procures, or aids or abets in the violating of any provision of this act, or who conspires to render ineffectual any valid order or decision of any court in the enforcement of this act, or who pro-

fures, conspires with, or aids or abets any person or persons in his or their failure to obey the provisions of this act, or to render ineffectual any valid order of any court in connection with the enforcement of this act shall be deemed guilty of a gross misdemeanor, and upon conviction, shall be punished by a fine not exceeding five hundred dollars ($500), or imprisonment in the county jail for not more than six months, or both such fine and imprisonment.

SEC. 12. In case any part or portion of this act shall be held unconstitutional, such holding shall not affect the validity of this act as a whole or any other part or portion of this act, and if any clause, sentence, paragraph, subdivision, section or part of this act shall for any reason be adjudged invalid, such judgment shall not affect, impair, or invalidate the remainder of the act, but shall be strictly confined in its operation and holding to the specific clause, sentence, paragraph, subdivision, section, or part thereof, directly involved in the controversy in which such judgment shall have been rendered; and all other acts and laws in conflict herewith are hereby repealed.

SEC. 13. In the event more than one injunction suit provided for in this act is instituted in this state, in different counties by different prosecuting attorneys, but against the same defendants, the respective superior judges hearing the causes may issue orders against said defendants in any county, but in the event any of the various county proceedings enter into the stage of receivership, as herein provided, then the judges hearing the respective causes shall order those causes where the defendants are the same, to be consolidated in one action in one particular county, and in such county as the judges may decide, to the end that only one receiver may be appointed for the entire state for the property of the same defendant or defendants.

EXHIBIT "B".

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

IN EQUITY No. 606.

GENE BUCK, Individually and as President of The American Society of Composers, Authors and Publishers, CARL FISCHER, INC., G. SCHIRMER, INC., IRVING BERLIN, INC., DEEMS TAYLOR, OLEY SPEAKS, WILLIAM J. HILL, ANNE PAUL NEVIN, ELLA HERBERT BARTLETT and JANE SOUSA, *Complainants*,

vs.

OTTO CASE, as State Treasurer of Washington; CLIFF YELLE, as State Auditor of Washington; ERNEST N. HUTCHINSON, as Secretary of the State of Washington; G. W. HAMILTON, as Attorney General for the State of Washington; B. GRAY WARNER, as District Attorney of King County of Washington; HARRY H. JOHNSTON, as District Attorney of Pierce County of Washington; RALPH E. FOLEY, as District Attorney of Spokane County of Washington; A. W. SWANSON, as District Attorney of Snohomish County of Washington; H. W. COVALT, as District Attorney of Whatcom County of Washington; SMITH TROY, as District Attorney of Thurston County of Washington; PAUL O. MANLEY, as District Attorney of Grays Harbor, County of Washington; JOHN D. EVANS, as District Attorney of Yakima County of Washington GLENN L. BEAN, as District Attorney of Walla Walla County of Washington; SAM M. DRIVER, as District Attorney of Chelan County of Washington; "JOHN DOE" and "RICHARD ROE", *Defendants*,

K. M. O., INC., a corporation, *Intervening Defendant*,

JOHN G. LOCKHART, *Intervening Defendant*.

Memorandum Decision Upon Complainants' Application for Interlocutory Injunction and Defendants' and Intervening Defendants' Motions to Dismiss.

Filed May 9, 1938.

Vanderveer & Bassett, 1311 Alaska Bldg., Seattle, Wn., Attorneys for Complainants. Louis D. Frohlich, Herman Finkelstein, H. W. Haughland, of Counsel for Complainants,

G. W. Hamilton, Att'y General, State of Washington, E. B. Donnelly, Asst. Att'y General, State of Wash., B. Gray Warner, Dist. Att'y, King County, Washington, Edwin C. Ewing, Asst. Dist. Att'y, King County, Wash., Harry H. Johnston, Dist. Att'y, Pierce County, Wash., Ralph E. Foley, Dist. Att'y, Spokane County, Wash., A. W. Swanson, Dist. Att'y, Snohomish County, Wash., H. W. Covalt, Dist. Att'y, Whatcom County, Wash., Smith Troy, Dist. Att'y, Thurston County, Wash., Paul O. Manley, Dist. Att'y, Gray's Harbor County, Wash., Robert J. Willis, Dist. Att'y, Yakima County, Wash., Glenn L. Bean, Dist. Att'y, Walla Walla County, Wash., C. C. Dill, Hutton Bldg., Spokane, Wash., Special Att'y for Ralph E. Foley, Dist Att'y Spokane County, Washington,

Alfred J. Schweppe and McMicken, Rupp & Schweppe, Colman Bldg., Seattle, Wash., Solicitors and Attorneys for Defendants,

Kenneth C. Davis, % KOL, Seattle, Washington, Clarence C. Dill, Hutton Bldg., Spokane, Washington, Leo Teats, 301 Fidelity Bldg., Tacoma, Washington, Attorneys for Intervening Defendant, K. M. O. Inc., a corporation,

Clark R. Belknap, 512 Hoge Bldg., Seattle, Washington, Solicitor for John G. Lockhart, Intervening Defendant.

Before Haney, Circuit Judge and Cushman and Bowen, District Judges.

The suit is one heard by three judges pursuant to Section 266 of the Judicial Code (Title 28, U. S. C. A., § 380).

Complainants, suing on behalf of themselves and, stating that the questions involved are of common and general interest to all members of the complainant Society, allege that they sue on behalf of others similarly situated.

The Bill of Complaint alleges:

* * * * * * *

"1. The complainant, American Society of Composers, Authors and Publishers (hereinafter referred to, for brevity's sake, as the 'Society'), at all times hereinafter mentioned, was and still is an unincorporated association duly

organized and existing under the laws of the State of New York, and has its principal place of business, in the Borough of Manhattan, City of New York, in the State of New York, in the Southern District of New York. The membership of the Society exceeds 1,000, and is comprised of authors, composers and publishers of musical works; said Society was organized and has been issuing licenses for the public performance for profit of musical compositions copyrighted by its members to users located throughout the United States, including the State of Washington, and said Society has protected the performing rights of musical works copyrighted by said members respectively, against infringement because of the public performance thereof for profit, and continues so to do."

* * * * * * *

The complainant corporations are corporations of the State of New York engaged in the business of publishing musical compositions.

The complainant individuals are citizens of the State of New York and Maine and are either authors or composers of musical compositions, or their surviving relatives.

The defendants are either officers of the State of Washington or prosecuting attorneys of counties of that State alleged to be charged with the duty of enforcing the Act alleged to violate the Constitution of the United States—Chapter 218 of the Laws of 1937 of the State of Washington (Washington Session Laws, 1937, p. 1070) entitled:

"An Act in aid of the Federal Copyright Laws, to assist in effectuating their true intent and their enforcement in the State of Washington by removing and declaring illegal certain monopolistic abuses and activities wrongfully practiced under the guise of copyrights within the state by price fixing combinations, monopolies, and pools; to enforce the Washington constitutional provisions prohibiting price fixing monopolies and combinations in restraint of commerce and trade; providing penalties for combining rights granted by the copyright laws where the effect of such combination results in the use of copyright privileges as instrumentalities of oppression and extortion within the state in violation

of constitutional provisions; and encouraging the rendition, creation and production of copyrighted works among the school children and citizens of the State of Washington; encouraging the marketing and acceptance of copyrighted works, created by the citizens of this state; repealing certain acts; creating a State Anti-Monopoly Board for a particular function to be exercised only in the event of abuses and violations hereof; defining its duties, and the jurisdiction and duties of courts of record, the duties of the prosecuting attorneys, county auditors, the state treasurer and the secretary of state; and providing for the appointment of a receiver in certain instances; defining certain terms; providing for service of process on nonresidents; prohibiting certain acts; and providing penalties for violation hereof and repealing section 2690 of Remington's Revised Statutes."

The following summary of the Act complainants ask to have declared violative of the Constitution of the United States is sufficient for the purposes of this decision.

Section 2 makes it unlawful for any person, without the consent of the owner of any copyrighted work, to cause it, or any substantial part thereof, to be publicly performed for profit in the State of Washington.

Section 3 forbids two or more persons claiming separate copyrighted works to pool their interests for the purpose of fixing prices on their use or to join together for the purpose of collecting fees or to issue blanket licenses in the State of Washington for their commercial use. Provision is, however, made allowing the issuance of licenses on rates assessed on a per piece system of usage not to exceed those in effect in other States and that such enactment shall not apply to an individual copyright author or owner.

Section 4 provides that persons pooling their interests in copyrighted musical works shall file a list thereof once a year in the office of the Secretary of State of Washington, together with a list of prices charged therefor, no filing fee being required. Additional information including the titles, dates of copyright, name of the author, publisher and owner and the addresses and residences of those

who have at any time had an interest in such copyrighted work, is required to be set forth therein.

Section 5 makes available to all persons for examination such lists and authorizes the Secretary of State to publish the same.

Section 6 makes mandatory the filing of such list if the copyrighted works are used commercially in the State whether originating from a point within or without its confines, providing, however, the individual owner, if not connected with any pool, is exempted from this requirement.

Section 7 declares that the creation of music and its commercial use and of copyrighted works within the State, whether originating at a point within or without the State, if publicly received within its confines, is a business affected with a public interest subject to the State's police power and reasonable regulation, but never in conflict with the copyright laws of the United States. This section further provides that certain things done in violation of the act creates a presumption that such persons have used their property within the State, giving it therein legal situs; any copyrighted works used or sold for public performance for profit, intended to be heard from a point without or within the State, is declared to be a commercial commodity with a legal situs within the State.

Section 8 of the Act provides that associations violating such act shall be deemed to have been doing business within the State and amenable to the process of its courts; provides that certain described acts in connection therewith shall be conclusive evidence that such combinations, even though non-residents, have accepted the privilege of doing business within the State; that the "use" by an agent of a privilege afforded by the State shall be deemed an acceptance of the Act and construed as an appointment of the Secretary of State of Washington as the lawful attorney upon whom may be served summons and process growing out of a violation of the Act and signify agreement that such service of process is equal to personal service within the State. This section also directs the manner of the service of process upon the Secretary of State and its mailing, by registered mail requiring personal delivery.

Section 9 of the Act provides for injunctions issuing in a suit begun by the prosecuting attorney of any county upon such service as described in Section 8 and that the Court shall enjoin persons from violating the provisions of the Act and the Constitutional provisions prohibiting price fixing monopolies and combinations; that if defendants persist in defying the judgment of the court it shall appoint the county auditor as receiver of the copyrighted works and property of the defendants; that in the event defendants attempt to withdraw such copyrighted works or property from the State in order to violate and render the Act, and the court's orders, ineffectual, a board consisting of the State Treasurer and State Auditor, with the Superior Court Judge as an advisory member, shall fix a fair and just rate for the public performance for profit of each of the copyrighted works of the defendants upon a per piece system or basis of licensing.

Amounts realized by the receiver are to be placed in a special fund which, less expenses, after one year, together with all copyrighted works of defendants, becomes subject to forfeiture, after notice to defendants and hearing, if defendants continue to wilfully disobey the court's order.

Section 10 provides that the appearance, special or otherwise, of defendants served with process as outlined in preceding sections of the act, shall be deemed as a general appearance.

Section 11 provides that violation of the act is a gross misdemeanor subjecting to punishment by fine or imprisonment in the county jail.

Section 12 provides that if part of the act is held unconstitutional, such holding shall not affect the validity of any other portion of the act.

Section 13 concerns procedure in case injunction suits are instituted by prosecuting attorneys in different counties of the State and in case of a resulting receivership.

The Bill of Complaint alleges:

* * * * * * *

(Par. 8, page 10) "that the value of the copyrights owned by each" (complainant) "publisher is in excess of $1,000,000.00;"

* * * * * * *

(Par. 8, page 11) "that each of the publisher complainants would be compelled to expend a sum in excess of $25,000.00 for payment to investigators, lawyers, clerical help and other expenses, in an attempt to compile and formulate a list of their respective copyrights containing the data required by said State statute."

* * * * * * *

That the complainants Buck (Par. 10, Complaint), Taylor (Par. 11, Complaint), Speaks (Par. 12, Complaint) and Hill (Par. 13, Complaint) have created musical works which have been copyrighted and the right of each to collect royalties from his works, as well as his right to secure renewals, are worth in excess of $100,000.00.

* * * * * * *

(Par. 14, Complaint) "that the rights" (of complainants Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa) * * * are of great value and are worth in excess of $100,000.00, with respect to each of said complainants."

* * * * * * *

(Par. 18, Complaint) "at the present time there are approximately 123 publisher members of the Society; there are approximately 1000 writer and composer members of the Society; from time to time said publisher, writer and composer members have entered into contracts with the Society, wherein and whereby said members of the Society have assigned to the Society their respective exclusive right of public performance for profit in their respective musical compositions for periods of five years at a time;"

* * * * * * *

(Par. 21, Complaint) "The users of music have uniformly objected to dealing with individual copyright owners for the licensing of the public performance for profit of particular musical compositions; the practice of the Society has been to license theatres according to their seating capacity, radio broadcasting stations according to their

ıcome, power and coverage, and hotels, cabarets and dance alls according to the respective size, business done, numer and size of orchestras, methods of performance, income nd standing; licenses are granted by the Society to such sers in which all the musical compositions owned, written, nd composed by members of the Society are made available to such users for use at any time within the contract eriod without requiring the specific consent of the owner f the particular composition played; such licenses include kewise the right on the part of the users to publicly perorm for profit the musical compositions copyrighted, ritten and composed by members of societies throughout he world organized on a basis similar to the Society with hom Society has contracts so that by licenses made with he Society the users obtain the right to publicly perform or profit the works of over 44,000 composers, authors and ublishers; said rights granted by the Society are of great alue to the users who have consistently and uniformly bjected to the separate licensing of individual compositions, on the ground that it would involve a great amount f bookkeeping, clerical hire and expense; the system of lanket licenses conferred by the Society performs a useful ervice for the users and enables them to have available t all times for their own special purposes a vast reservoir f musical compositions that are pleasing and entertaining o the public, classical, modern, as well as popular; * * *

* * * * * * *

"that if the individual complainants were to create an gency within the State of Washington to protect against nfringement of their respective musical copyrights by unuthorized public performances for profit and to issue lienses thereunder to users in the State of Washington and heck up on the accuracy of uses reported, the cost thereof o each of such individual complainants would be greatly n excess of $10,000 a piece, which expenditure would be ecessary in the employment of investigators, clerical help, ccountants and lawyers."

* * * * * * *

(Par. 24, Complaint) "Upon information and belief, the Society pursuant to the rights vested in it by the contracts made with complainants herein, and others similarly situated, has for many years entered into numerous contracts which are now in force between it and users of music within the State of Washington, in which the Society has licensed such users to publicly perform for profit the musical compositions of its members; there are about 528 contracts in force at the present time from which the Society received for the year 1936 the sum of $60,530.68;"

* * * * * * *

(Par. 25, page 28, Complaint) "Under mutual working arrangements with foreign societies, the Society has the exclusive right to and does license within the United States, the public performance for profit of the musical compositions copyrighted by all the members of said respective foreign societies, and said foreign societies have the exclusive right to, and do license within the territorial limits of their respective countries, the public performance for profit of the musical compositions copyrighted by members of the Society. Under such arrangements between the Society and said foreign societies, the latter are not required to, and never have, filed lists of the respective works copyrighted by their respective members. The catalogues of musical compositions of said foreign societies exceed many hundreds of thousands of compositions composed and written by more than 44,000 members of such foreign societies, the exact number of compositions being utterly impossible to state at any one time on account of the expiration, renewal and obtaining of new copyrights. The right to perform the musical compositions embraced in said foreign catalogues is included in the blanket licenses issued to individual licensees by the Society in the United States. It is virtually impossible for the Society to obtain the information with respect to foreign copyrights required by Chapter 218 of the Laws of Washington, 1937, and the cost of even attempting to comply with that law would be far in excess of $50,000, and filing of monthly lists of changes would be wholly impracticable, because of expense, dis-

tance and the necessity of translations, together with the fact that no arrangements exist with foreign societies providing that such information be furnished. Their 44,000 members are scattered throughout the world, and they are not required to file a complete list of their works in order to enjoy copyright protection in the United States under the Treaties, Proclamations and United States Laws aforesaid."

(Paragraph 26, page 29) "Upon information and belief, compliance with said State Statute would require the Society and its licensees to abandon the contracts between them and would compel each of the complainants, as well as other members of the Society similarly situated to rescind their respective contracts with the Society unless they were willing to have their works used for purposes of public performance for profit in Washington on an arbitrary basis upon a per piece system; complainants and others similarly situated are not willing to permit their musical compositions to be performed within the State of Washington publicly for profit upon a per piece basis or on any basis wherein the fee or compensation would be arbitrarily determined by the State of Washington, or any of its agencies, or by anybody else; complainants believe that such price-fixing would deprive them of the exclusive rights vouchsafed to them under the copyright law; if each complainant would be required to act independently in order to have the right to fix license fees, each complainant would be required to have an investigator covering each of the places of public entertainment and amusement in the State of Washington to determine whether any infringements took place and to determine whether payments were being made in accordance with performances; the establishment of such an agency would cost each of the complainants many thousands of dollars and would in fact greatly exceed the revenue which each of them might hope to collect in the State of Washington; all the users in the State of Washington paid for the music of the 44,000 composers represented by the Society and its affiliated societies for the year 1936, the aggregate sum of $60,530.68. In the year 1936, the following counties of the State of Washington paid to the Society for licenses to publicly perform for profit musical compositions

of complainants and the other members of the Society and all other Societies throughout the world affiliated with the Society, the following sums:

County.	Amount Collected.
Benton	469.45
Callon	30.00
Chelan	701.00
Clallon	168.52
Clarke	316.13
Columbia	36.20
Cowlitz	62.20
Franklin	45.00
Garfield	40.00
Grand	22.50
Grays Harbor	1,265.68
Island	10.00
Kings	31,669.41
Kitsap	254.15
Kittatas	126.60
Klickitat	30.00
Lewis	443.70
Lincoln	15.00
Mason	62.50
Okanogan	123.25
Pend Oreille	49.80
Pierce	4,161.63
Skagit	37.50
Snohomish	661.77
Spokane	16,445.63
Thurston	384.02
Walla Walla	906.29
Wahkiakum	15.00
Whatcom	986.75
Whitman	258.90
Yakima	932.10
Making a Total of	$60,530.68

The proportion collected from each county represents the approximate proportions that were collected from each county for other years prior to 1936, and similar sums will

be collected in the same proportion in the future unless prevented by the operation of the said State Statute. The cost to the Society of attempting to compile the lists and information required to be furnished under the State Statute would be far in excess of $300,000, which sum would have to be expended for research work with reference to the past history of each and every copyright owner, by every one of the 44,000 members of the Society and its affiliated societies, lawyers fees for opinions as to the rights of parties, involved with respect to the ownership, grants, licenses and other interests in the respective copyrights, clerical help and other incidental expenses; even with such an expenditure, it would be utterly impossible to furnish an accurate or complete list of all the respective copyrights of the members of the Society and of its affiliated societies with all of the data required by the state statute."

* * * * * * *

(Paragraph 36, page 41, Complaint) "Each of the complainants has received from the Society for the year 1936, as compensation for the public performance for profit of the complainants' works, respectively, in excess of the following sums: Carl Fischer, Inc. in excess of $50,000.00; G. Schirmer, Inc. in excess of $50,000.00; Irving Berlin, Inc. in excess of $50,000.00; Gene Buck in excess of $5,000.00; Deems Taylor in excess of $5,000.00; Oley Speaks in excess of $5,000.00; William J. Hill in excess of $5,000.00; Anne Paul Nevin in excess of $5,000.00; Ella Herbert Bartlett in excess of $5,000.00; and Jane Sousa in excess of $5,000.00; upon information and belief, complainants will be entitled to receive for the balance of the period for which they have entered into contracts with the Society, and for which the Society has contracts with users of music, similar amounts for each year, down to December 31, 1939, and such complainants will receive such amounts for said period if their right thereto is not interfered with and destroyed by such State Statute; approximately two-thirds of the revenue obtained by the Society and distributed to the complainants and others similarly situated, is derived from moneys paid for the right to perform publicly for profit by means of radio broadcasting, and if this Court does not interfere and re-

strain the enforcement of such State Statute, such revenue may be lost to the Society and the complainants and others similarly situated will not participate in royalties from the public performance for profit by means of radio broadcasting, because such performances, even though given in other parts of the United States, may, under the provisions of such State Statute, be deemed a violation of such State Statute in the State of Washington, and licenses made outside of the State of Washington may result in forfeiture by the State of Washington of all complainants' copyrights, and complainants will lose the benefit of their said contracts with the Society and all the contracts made between the Society and users of music, and will receive no further moneys from public performance for profit by means of radio broadcasting of their musical compositions. * * * "

Except as to matters alleged upon information and belief, the verification of the Bill of Complaint by Gene Buck states that such complainant is fully familiar with the facts stated and avers them to be true.

Complainants, in part, pray that defendants:

* * * * * * *

"be enjoined and restrained by temporary and permanent order of injunction of this Court, from bringing, directly or indirectly, and from permitting to be brought, directly or indirectly, any proceeding at law or in equity for the purpose of enforcing said Statute, Chapter 218 of the Laws of 1937 of the State of Washington, against the complainants and others similarly situated, representatives, employees, agents or any of them, including the Society, as and when said Statute goes into effect, and from taking any steps to create or act as an anti-monopoly board, and from demanding a list of copyrights of musical works from complainants and others similarly situated, and from attempting to appoint or take any steps leading to the appointment of a receiver, and from attempting to seize, escheat or confiscate copyrights and choses in action of complainants and others similarly situated, and from attempting to fix any fees or grant licenses on a per piece system or otherwise on any of complainants' copyrighted musical works, and

from attempting to collect any license fees on the copyrighted musical works of complainants and others similarly situated, and from interfering with all existing contracts entered into between complainants and others, including the Society and citizens and residents of the State of Washington, and from threatening to enforce against any citizens or residents of the State of Washington, the penalties of said Statute in the event such citizens and residents desire to carry out their contracts with Society or complainants and others similarly situated, and from taking any steps to declare an involuntary assignment of the copyrights of complainants and others similarly situated, and from filing lists thereof with the Register of Copyrights in Washington, D. C., and from prosecuting criminally the complainants, their representatives or agents, or any of them, or others similarly situated, for doing any act or thing to detect infringement and to enforce their respective rights under the Copyright Act in the Federal Courts of the State of Washington or elsewhere, and generally, from doing any act or thing to carry out or enforce any of the provisions of said State Statute as and when the same goes into effect; * * * "

* * * * * * *

Filed with the Bill of Complaint were affidavits of the complainant Gene Buck, Walter S. Fischer, President of complainant Carl Fischer, Inc., Saul H. Bornstein, Treasurer of complainant Irving Berlin, Inc., Gustave Schirmer, Secretary of complainant G. Schirmer, Inc., and the individual complainants Anne Paul Nevin, Deems Taylor and Ella Herbert Bartlett. These affidavits, in addition to stating the nature, extent and value of the affiants' copyright interests, contain allegations regarding the difficulty and expense of complying with the provisions of the State statute. These affidavits, while in certain respects more specific and detailed than the bill of complaint, insofar as the matter in controversy exceeding $3,000.00, exclusive of interest and costs, is concerned, offer nothing material in addition to the matter contained in the bill nor was there anything relevant upon this issue shown in the testimony taken upon the hearing.

This court was convened to hear the application of complainants for an interlocutory injunction. At the hearing of

such application, motions of the defendants and intervening defendants to dismiss were also heard. Among the grounds enumerated in Defendants' motion to dismiss are the following:

"I.

That this case does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, in that the amount or value of the subject matter in dispute does not exceed the sum of three thousand dollars ($3,000.00), exclusive of interest and costs, and that in this regard, it, among other things, more particularly appears:

1. That the individual complainants are exempt from the operation of the act (Section 3—See Exhibit 'E', Bill of Complaint, page 75).

2. That the complainants, American Society of Composers, Authors and Publishers, is 'a voluntary, unincorporated, non-profit corporation' (Bill of Complaint, page 19) and will suffer no loss in complying with the act.

3. That complainants cannot aggregate the amounts in controversy in order to secure the requisite jurisdictional amount.

4. That the act (Section 4—Bill of Complaint, page 75) does not require any filing or license fee to be paid by complainants, or any of them."

. . . . . .

IV.

. . . . . .

"3. That complainants have a plain, speedy and adequate remedy at law, in that

(a) Complainants can adequately interpose a defense to any criminal proceeding brought under the act (Section 11—Bill of Complaint, page 81), and such right of defense is an adequate remedy at law; and

(b) That complainants can adequately interpose their defense in any injunction suit brought by any prosecutor

under Section 9 of the act (Bill of Complaint, page 78), it being specifically provided in Section 10, Bill of Complaint, page 80, that no right of any person shall be affected in the state courts 'without full and complete due process of law'.

4. That defendants assert that they do not intend to enforce the criminal penalties of the act until the validity of the act is adjudged."

* * * * * * *

Complainants cite: Buck v. Elm Lodge, 83 F. (2d) 201 (C. C. A. 2); Simkins, Federal Practice (1934), Sec. 468; Green County vs. Thomas' Exr., 211 U. S. 598; Collings vs. Guarantee Trust Co., 10 F. Supp. 462; McNutt v. General Motors Acceptance Corp., 298 U. S. 178; KVOS, Inc. vs. Associated Press, 299 U. S. 269; State vs. Scollard, 126 Wash. 335; Connally vs. General Const. Co., 269 U. S. 385; Lawton vs. Steele, 152 U. S. 133, 136-137; Smith vs. Cahoon, 283 U. S. 553; Hartford S. B. I. & Ins. Co. vs. Harrison, 301 U. S. 459, 81 L. Ed. 857; Louis vs. Boynton, 53 Fed. (2d) 471; Nutt vs. Ellerbee, 56 Fed. (2d) 1058; U. S. v. Bell Telephone Co., 167 U. S. 224, 249; Stevens vs. Gladding, 17 How. 451; Stevens vs. Cady, 14 How. 528; Ager vs. Murray, 105 U. S. 126; U. S. vs. Dubiller Condenser Corp., 289 U. S. 178, 186; Frost Trucking Co. v. Railway Comm., 271 U. S. 583 at 591; Stephenson vs. Binford, 287 U. S. 251, 275; Minnesota Rate Cases, 230 U. S. 352; Addyston Pipe & Steel Co. vs. U. S., 175 U. S. 211 at 227; Brennan vs. Titusville, 153 U. S. 302; Western Union Telegraph Co. vs. James, 162 U. S. 650 at 655; Southern Ry. Co. vs. Ry. Comm. of Ind., 236 U. S. 439; Prigg vs. Com. of Pa., 16 Pet. 539, 617; State ex rel. Foss Co. vs. Kelly, 186 Wash. 589; Van Dusen vs. Dept. of Labor & Industries, 186 Wash. 589; Patterson vs. Kentucky, 97 U. S. 501; Allen vs. Riley, 203 U. S. 347; Woods vs. Carl, 203 U. S. 358; Carbice vs. Am. Patents Corp., 283 U. S. 27; Fox Film vs. Doyal, 286 U. S. 123; Straus vs. Am. Publ. Assn., 231 U. S. 222; State of Wash. vs. Am. Soc. C. A. & P., 13 F. Supp. 141; City of Des Moines vs. Des Moines City Ry., 214 U. S. 179; Speilman Motor Sales Co. vs. Dodge, 295 U. S. 89; Cincinnati vs. Traction Co., 245 U. S. 446; Henderson vs. Railroad Comm., 56 F. (2d) 218;

Defiance Water Co. v. Defiance, 191 U. S. 184; Ferris vs. Frohman, 223 U. S. 424; Georgetown vs. Alexandria Canal, 12 Pet. 91; Healy v. Ratta, 29[illegible] U. S. 263; Pierce vs. Society, 268 U. S. 510; Carter v. Carter Coal Co., 298 U. S. 238; James v. Campbell, 104 U. S. 356 (1881) 358; Lithograph Co. v. Sarony, 111 U. S. 53, 59 (1884); American Tobacco Co. v. Werckmeister, 207 U. S. 284, 291 (1907); Caliga v. Inter Ocean Newspaper, 215 U. S. 182, 188 (1909); Rubber Tire Wheel Co. v. Milwaukee Rubber Co., 154 Fed. 358, 361; Monongahela v. United States, 148 U. S. 312, 335; Story, Commentaries, Sec. 1152; 174th St. etc. Amusement Co. v. Maxwell, 169 N. Y. Supp. 895; Performing Rights Society, Ltd. v. Thompson, 34 T. L. R. 351; Performing Rights Soc. Ltd. v. Magistrates, 1922, S. C. 165; Performing Rights Soc. Ltd. v. London Theatre, L. R. (1924) A. C. 1; Buck v. Jewell-LaSalle, 283 U. S. 191; Society of European Stage Authors, Inc. v. N. Y. Statler Hotel, (S. D. N. Y., Apr. 30, 1937); M. Witmark & Sons v. Standard Music Roll Co., 221 Fed. 376, 379 (C. C. A. 3); Wheaton v. Peters, 8 Pet. (33 U. S. 591); Little v. Hall, 18 How. (59 U. S.) 165; Douglas v. Cunningham, 294 U. S. 207, 209 (1935); White-Smith Music Co. v. Appolo Co., 209 U. S. 1, 19; Globe Newspaper Co. v. Walker, 210 U. S. 356, 367; New Fiction Pub. Co. v. Star Co., 220 Fed. 994; Webb v. Powers, 2 Woodb. & M. 497, 29 Fed. Case No. 17,323; Napier v. Atlantic C. L. R. Co., 272 U. S. 605; N. P. Ry. Co. v. Cooney, Governor, 12 Fed. Supp. 73; Louisville & N. R. Co. vs. State, 76 So. (Ala.) 505; Erie R. Co. v. N. Y., 233 U. S. 671; N. P. Ry. Co. vs. Washington, 220 U. S. 370; So. Ry. Co. v. Railr. Com., 236 U. S. 434; New York C. R. Co. v. Winfield, 244 U. S. 148; Penn. R. Co. v. Pub. Service Commission, 250 U. S. 569; Panama R. R. Co. v. Johnson, 264 U. S. 375, 387; Southern Pacific Co. v. Jensen, 244 U. S. 207, 217; Coca Cola v. State, 225 S. W. 791; McCarthy v. White, 259 Fed. 364 (S. D. N. Y. 1919); Nutt v. National Institute Inc., 31 Fed. (2d) 236, 238 (1929 C. C. A. 2); Uproar Co. v. National Broadcasting Co., 8 Fed. Supp. 358, 362 (D. C. Mass. 1934) 81 Fed. (2d) 373; Walling v. Michigan, 116 U. S. 446, 454 (1886); Walton v. Missouri, 91 U. S. 275 (1875); Bethlehem Motors Co. v. Flynt, 256 U. S. 421 (1921); Cramling v. Ma. well, 52 Fed. (2d) 256

(W. D. N. Car.); Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 511 (1935); Allgeyer v. Louisiana, 165 U. S. 578, 589; St. Louis Compress Co. v. Arkansas, 260 U. S. 346, 348; New York Life Ins. Co. v. Head, 234 U. S. 149, 161; Home Ins. Co. v. Dick, 281 U. S. 397, 407; Aetna Life Ins. Co. v. Duncan, 266 U. S. 389, 399; Rawleigh v. Harper, 173 Wash. 233; Klabzuba v. Southern Pac. Co., 33 F. (2d) 359; Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U. S. 143, 149; Harrison v. St. Louis & San Francisco R. R., 232 U. S. 318; Chipman, Ltd. v. Jeffrey Co., 251 U. S. 373, 379; Cooper Manufacturing Co. v. Ferguson, 113 U. S. 727; Minnesota Commercial Men's Assn., 261 U. S. 140; Old Wayne Life Association v. McDonough, 204 U. S. 8; Peoples's Tobacco Co. v. American Tobacco Co., 246 U. S. 79; Green v. Chicago & Quincy Ry., 205 U. S. 530, 532; Fruit Industries Ltd. v. Metro, 18 F. Supp. 489; Parsons-Willis Lumber Co. v. Stuart, (C. C. A. 5th, 1910); 182 Fed. 779; James Dickinson Farm Mortgage Co. v. Harry, 273 U. S. 119, 122; Caledonian Coal Co. v. Baker, 196 U. S. 432, 444; Bank of America v. Whitney Central National Bank, 261 U. S. 171; Manley v. Georgia, 279 U. S. 1, 6; Heiner v. Donnan, 285 U. S. 312, 318; Morrison v. California, 291 U. S. 82, 90; Cline v. Frink Dairy Co., 274 U. S. 455, 457; H. Earl Clack Co. v. Public Service Com., 94 Mont. 488, 501, 22 Pac. (2d) 1056; United States v. Cohen Grocery Co., 255 U. S. 81, 89; A. B. Small Company v. American Sugar Ref. Co., 267 U. S. 233, 239 and 240; Ex Parte Young, 209 U. S. 123, 147, 148; State v. Crawford, 74 Wash. 248; Connolly v. Union Sewer Pipe Co., 184 U. S. 540 (1902) 562; State v. Cudahy P. Co., 33 Mont. 179; Seattle v. Ford, 144 Wash. 107; Inmin v. Sandvig, 170 Wash. 112; Kaufman v. West, 133 Wash. 192; Corn v. Fort, (Tenn.) 95 S. W. (2d) 620 (1936); Aberdeen S. & L. Assn. v. Chase, 157 Wash. 351, 392; Burr v. Chase, 157 Wash. 393; Dobbins v. Los Angeles, 195 U. S. 223, 240; McFarland v. American Sugar Co., 241 U. S. 79, 86; Wrthen Co. v. Kavanaugh, 295 U. S. 56 (1935) 60, 62; Fisher v. Kittinger, 39 Wash. 174; Tyson v. Banton, 273 U. S. 418, 429 (1927) 430, 441; Wolff Co. v. Industrial Court, 262 U. S. 522; Adams v. Tanner, 244 U. S. 590; Kibnik v. McBride, 277 U. S. 350; New State Ice Co. v. Liebman, 285 U. S. 262; Paul v. Virginia, 8 Wall. 168; Terral v.

Burke Construction Co., 257 U. S. 529, 532; Missouri Pacific Ry. Co. v. Larabee, 234 U. S. 459; Williams v. Standard Oil Co., 278 U. S. 235, 243; Carter v. Carter Coal Co., 298 U. S. 238, 316; Railroad Board v. Alton R. Co., 295 U. S. 330, 362; Metro-Goldwyn-Mayer Distributing Corporation v. Lamb, D. C., New Mexico, 1933; United States v. Interstate Circuit, Inc., 20 F. Supp. 868; Bobbs-Merrill Co. v. Straus, 210 U. S. 339; United States v. General Electric Co., 272 U. S. 476 at 485; American Banana Co. v. United Fruit Co., 213 U. S. 347; Title 15, U. S. C. A., Sec. 11; Buck v. Harry R. Swanson, No. 562, Equity, U. S. District Court for the District of Nebraska, Lincoln Division; Henneford v. Northern Pacific Ry., 82 L. Ed. 443; Troy Bank v. Whitehead & Co., 222 U. S. 39 (1911); Local Union No. 497 v. Joplin & P. Ry. Co., 287 Fed. 473 (C. C. A. 8, 1923); Haynes v. Fraternal Aid Union, 34 F. (2d) 305; Shields v. Thomas, 17 How. 3 (1854); Rodd v. Heartt, 17 Wall. 354, 357 (1873).

Defendants cite: Simkins Federal Practice (1934) Sections 386, 395-9; Pennsylvania v. Williams, 294 U. S. 176; Gordon v. Washington, 295 U. S. 30; Woods v. First National Bank, 16 F. (2d) 856 (C. C. A. 9th); Judicial Code, Section 37, 28 U. S. C., Section 80; Simkins Federal Practice (1934), Sections 483, 446, 462; McNutt v. General Motors Acceptance Corp., 298 U. S. 178; Simkins Federal Practice (1934), Sections 439, 444, 487; Matthews v. Rogers, 284 U. S. 521, 524, 525; Pusey & J. Company v. Hanssen, 261 U. S. 491, 500; American Mutual Liability Insurance Company v. McDonough, 61 F. (2d) 558, certiorari denied, 288 U. S. 602; KVOS v. Associated Press, 299 U. S. 269, 57 S. Ct. 197; Simkins Federal Practice (1934), Sec. 652; Missouri P. R. Co. v. Norwood, 283 U. S. 249; Allen v. Riley, 203 U. S. 347; Patterson v. Kentucky, 97 U. S. 501; John Woods & Sons v. Carl, 203 U. S. 358; Ozan Lumber Co. v. Union Nat'l Bank, 207 U. S. 251; Carbide Corp. v. American Patents Corp., 283 U. S. 27, 33; foot-note; Fox Film Corp. v. Doyal, 286 U. S. 123; Straus v. American Publishers Ass'n., 231 U. S. 222; State v. A. S. C. A. P., 13 F. Supp. 141; Heald v. District of Columbia, 259 U. S. 114; Arizona Copper Co. v. Hammer, 250 U. S. 400; Walker v. Gish, 260 U. S. 447; Lehon v. Atlanta, 242 U. S. 53; Oliver Iron Mining Co. v. Lord, 262 U. S. 172; Simkins Federal Practice (1934), Sec.

458, p. 401, and cases cited; Dahnke-Walker Co. v. Bondurant, 257 U. S. 285, 289; Panama R. Co. v. Johnson, 289 Fed. 964, affirmed 264 U. S. 374; Blair v. United States, 250 U. S. 273, 279; Massachusetts v. Mellon, 262 U. S. 447, 488; Dewar v. Brooks, 16 F. Supp. 636, 638, 9; Healy v. Ratta, 292 U. S. 263; Hale v. Mann, 15 Fed. (2d) 1051, 1052; Wheless v. City of St. Louis, 180 U. S. 379 at 393; Eberhard, v. Northwestern Mutual Life Ins. Co., 241 Fed. 353; Chapter 34 of the Laws of 1909 of the State of New York, as amended by Chapter 915, Laws of 1930 and Chapter 609 of the Laws of 1932; Spielman Motor Sales Co. v. Dodge, 295 U. S. 678; Cincinnati v. Traction Co., 245 U. S. 446; Henderson v. Railroad Commission, 56 Fed (2d) 218; Des Moines v. Railway, 214 U. S. 179; Defiance Water Co. v. Defiance, 191 U. S. 184; Savannah v. Hilton, 51 S. E. 744; Columbia Building Co. v. Grange, 77 Fed. 798; Boise Artesian Water Co. v. Boise City, 213 U. S. 276; Texas Co. v. Grosjean, 16 Fed. Supp. 264; Cruickshank v. Bidwell, 176 U. S. 73; Indiana Mfg. Co. v. Koehne, 188 U. S. 681; Atlantic Pipe Line Co. v. State Tax Board, 12 F. Supp. 265; Western Union Telegraph Co. v. Georgia, 269 U. S. 67; Cavanaugh v. Looney, 248 U. S. 450; Pullman Co. v. Tamble, 173 Fed. 200; City of St. Augustine v. St. James Electric Co., 286 Fed. 474; Columbus Ry. etc. Co. v. City of Columbus, 253 Fed. 499; Associated Press v. Herrick, 13 F. Supp. 897; Union Sulphur Co. v. Reed, 249 Fed. 172; Argonaut Mining Co. v. McPike, 78 F. (2d) 584; Ryan v. Amazon Petroleum Corp., 71 F. (2d) 1; Davis v. Farnum Mfg. Co., 189 U. S. 207; Dartmouth Woolen Mills v. Myers, 16 F. Supp. 633; Amalgamated Oil Gas Corp. v. San Francisco, 263 Fed. 617; Securities Exchange Comm. v. Electric Bond and Share, 18 F. Supp. 131; Bristol-Myer Co. v. Tischauer, 18 F. Supp. 228; Fitts v. McGhee, 172 U. S. 516; Richmond Hosiery Mills v. Camp, 74 F. (2d) 200; McCormack Bros. Co. v. City of Tacoma, 201 Fed. 374; Clark v. Lindemann & Hoverson Co. 88 F. (2d) 59; Northport Power & Light Co. v. Hartley, 283 U. S. 568, 570; Simkins, Federal Practice (1934) Sec. 735; National Fire Ins. Co. vs. Thompson, 281 U. S. 331; Meccano, Ltd. v. John Wanamaker, 253 U. S. 136, 141; Chicago, Great Western Ry. vs. Kentall, 266 U. S. 94, 100; Rend vs. Ventura Oil Co., 48 Fed. 248; Spark vs. Hart Coal Corp.,

74 F. (2d) 697, 699; Jamestown Veneer & P. Corp. v. Boland, 15 F. Supp. 28; Sparks vs. Mellwood Dairy, 74 F. (2d) 695; Behre v. Anchor Ins. Co., 297 Fed. 986; Phoenix R. R. vs. Geary, 239 U. S. 277; Yarnell vs. Hillsborough P. Co., 70 F. (2d) 435; Article I, Section 8, Federal Constitution; Title 17, U. S. Code, Sections 42, and 44; New Fiction Publishing Company v. Star Company, 220 F. 994,; Article XII, Section 22, Constitution of the State of Washington; American Export Door Corp. v. Gauger, 154 Wash. 514; Kuhn v. Fairmont Coal Co., 215 U. S. 349; Simkins Federal Practice (1934), Sec. 337; Grant-Smith Porter Ship Co. v. Rohde, 25 U. S. 469; Millers Indemnity Co. v. Brand, 270 U. S. 59; Union Bank & Trust Co. v. Phelps, 288 U. S. 181; Carley & Hamilton v. Snook, 281 U. S. 66; Hart Refineries v. Harmon, 278 U. S. 499, 574; Smith v. Cahoon, 283 U. S. 553; State Board v. Jackson, 283 U. S. 527; Village of Euclid v. Ambler, 272 U. S. 365; Baldwin Case, 294 U. S. 511; Henneford v. Mason Co., 300 U. S. 577; Hyland Farms v. Agnew, 300 U. S. 608; Union Dry Goods Co. v. Georgia Public Service Corp., 248 U. S. 372; Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398, 434-5; Manigault v. Sprins, 199 U. S. 473, 480; Terral v. Burke Construction Co., 257 U. S. 529; Paul v. Virginia, 8 Wall. 168; Hooper v. California, 155 U. S. 648; Moore v. New York Cotton Exchange, 270 U. S. 593; Savage v. Jones, 225 U. S. 501; Continental Wallpaper Co. v. Voight & Sons, 212 U. S. 227; Ludeling v. Chaffe, 143 U. S. 301; Giles v. Little, 134 U. S. 645, 649; McCandless v. Pratt, 211 U. S. 437; Dahnke v. Walker Milling Co. v. Bondurant, 257 U. S. 282, 289; Hale v. Mann, 15 Fed. Supp. 1051; Pinel v. Pinel, 240 U. S. 594; Hart Coal Corporation v. Sparks, 9 F. Supp. 825; Clay v. Field, 138 U. S. 464, 479; Lion Bonding & Surety Company v. Karatz, 262 U. S. 77; Harvey v. Raleigh & G. R. Co. et al., 89 Fed. 115; Healy vs. Ratta, 292 U. S. 263.

Intervening Defendant KMO, Inc., cites: Pennsylvania v. Williams, 294 U. S. 176; Gordon v. Washington, 294 U. S. 30; Woods v. First National Bank, 16 F. (2d) 856; Grael v. United Electric Co., 132 Fed. 252, 265; Harley v. Fireman's Fund Insurance Co., 245 F. 471; Demer v. Pacific SS. Co., 273 Fed. 567, 577; Hansen v. Pacific Coast Cement

Co., 243 Fed. 285; Eddy v. Chicago & N. W. R. Co., 226 Fed. 120, 125; Ex Parte Poresky, 290 U. S. 30; Patterson v. Kentucky, 97 U. S. 501; Allen v. Riley, 203 U. S. 347; John Woods & Sons v. Carl, 203 U. S. 358; Ozan Lumber Co. v. Union County Nat'l Bank, 207 U. S. 251; Carbide Corp. v. American Patents Dev. Co., 283 U. S. 27, 33, footnote; Fox Film Corp. v. Doyal, 286 U. S. 123; Straus v. American Publish. Assn., 231 U. S. 222, 234-5; State v. A. S. C. A. P., 13 F. Supp. 141; Heald v. District of Columbia, 259 U. S. 114; Arizona Copper Co. v. Hammer, 250 U. S. 400; Walker v. Gish, 260 U. S. 447; Lehon v. Atlanta, 242 U. S. 53; Oliver Iron Mining Co. v. Lord, 262 U. S. 172; Panama R. Co. v. Johnson, 289 Fed. 964, affirmed, 264 U. S. 374; Yazoo & Miss. R. Co. v. Jackson Vinegar Co., 226 U. S. 217; Blair v. United States, 250 U. S. 273, 279; Massachusetts v. Mellon, 262 U. S. 447, 488; McNutt v. General Motors Acceptance Corp., 298 U. S. 178; KVOS v. Associated Press, Inc., 299 U. S. 269, 57 S. Ct. 197; Columbia Building and Loan v. Grange, 77 Fed. 798; Wheless v. City of St. Louis, 180 U. S. 379 at 383; Dewar v. Brooks, 16 F. Supp. 636; Scribner v. Straus, 210 U. S. 352; Spielman Motor Sales Co. v. Dodge, 295 U. S. 678; Cincinnati v. Traction Co., 245 U. S. 446; Henderson v. Railroad Commission, 56 Fed. (2d) 218; Savannah v. Hilton, 51 S. E. 744; Boise Artesian Water Co. v. Boise, 213 U. S. 276; Texas Co. v. Grosjean, 16 F. Supp. 264; Cruickshank v. Bidwell, 176 U. S. 73; Indiana Mfg. Co. v. Koehne, 188 U. S. 681; Atlantic Pipe Line Co. v. State Board, 12 Fed. Supp. 265; Western Union Telegraph Co. v. Georgia, 269 U. S. 67; Cavanaugh v. Looney, 248 U. S. 450; Pullman Co. v. Tamble, 173 Fed. 200; Columbus Ry. etc. Co. v. City of Columbus, 253 Fed. 499; Associated Press v. Herrick, 13 F. Supp. 897; Union Sulphur Co. v. Reed, 249 Fed. 172; Argonaut Mining Co. v. McPike, 78 F. (2d) 584; Ryan v. Amazon Petroleum Corp., 71 F. (2d) 1; Davis v. Farnum Mfg. Co., 189 U. S. 207; Dartmouth Woolen Mills v. Myers, 16 F. Supp. 633; Securities Exchange Comm. v. Electric Bond & Share, 18 F. Supp. 131; Bristol Myer Co. v. Tischauer, 18 F. Supp. 228; Fitts v. McGhee, 172 U. S. 516; Richmond Hosiery Mills v. Camp, 74 F. (2d)

200; McCormick Bros. Co. v. City of Tacoma, 201 Fed. 374; Clark v. Lindemann & Hoverson Co., 88 F. (2d) 59; Mathews v. Rodgers, 284 U. S. 521, 529, 530; Simkins Federal Practice (1934) Sec. 735; National Fire Ins. Co. v. Thompson, 281 U. S. 331; Rend v. Ventura Oil Co., 48 Fed. 248; Jamestown Veneer & P. Corp. v. Boland, 15 Fed. Supp. 28; Sparks v. Mellwood Dairy, 74 F. (2d) 695; Behre v. Anchor Ins. Co., 297 Fed. 986; Phoenix R. R. v. Geary, 239 U. S. 277; Yarnell vs. Hillsborough P. Co., 70 F. (2d) 435; American Society of Composers, Authors and Publishers vs. Elm Lodge, May 12, 1936, J. Bryant, District Court of New York; Caliga vs. Newspaper Co., 215 U. S. 188; United States v. Knight, 136 U. S. 1; U. S. National Bank v. Maine, 284 U. S. 331; Palmer v. Texas, 212 U. S. 119; Article XII, Sec. 22 of the Washington Constitution; Ager v. Murray, 105 U. S. 126; State v. Morey, 105 Pac. 501; National Harrow Co. v. Hendh, 83 Fed. 36; Maloney, Attorney General v. American Tobacco Co., 72 Fed. 801; Hoit vs. Bates, 81 Fed. 641; Carle Laemmle Music Co. vs. Stern, 209 Fed. 129; Murphy v. Johnson, 49 Fed. (2d) 410; Blytheville Ry. Co. vs. St. Louis San Francisco Ry. Co., 33 Fed. (2d) 481; Von Herberg vs. City of Seattle, 27 Fed. (2d) 457; Georgia Trust Co. vs. State of Georgia, 109 Ga. 766; 35, S. E. 323; 40 Corpus Juris 198; State vs. Racina, 63 Civ. Appeals 663, 134 S. W. 400; 41 Corpus Juris 127; Howard vs. Fleming, 191 U. S. 126; Ughbanks vs. Armstrong, 208 U. S. 481; Randall v. Brigham, 74 U. S. 523; In re Jordan, 49 Fed. 238; Germania Insurance Co. v. Wisconsin, 119 U. S. 473; Pullman Palace Car Company v. Speck, 113 U. S. 84; Schipper v. Consumer Cordage Co., 73 Fed. 803; Kansas City Railroad v. Daughtry, 138 U. S. 298; Associated Press v. National Labor Relations Board, 301 U. S. 103; West Coast Hotel Co. v. Parrish, 300 U. S. 379; Hobbie vs. Jennison, 149 U. S. 355, 13 Sup. Ct. Rep. 879; 37 L. Ed. 766; Adams v. Burke, 17 Wallace 453; Boesch v. Graff, 133 U. S. 697, 10 Sup. Ct. Rep. 378; Buck v. Jewell-Lasalle, 283 U. S. 191, 51 Sup. Ct. Rep. 412; Billiard Table Manufacturing Co. v. Tyler Bunk, 16 Fed. Supp. 990; Bass vs. State Tax Commission, 133 N. E. 122, 232 N. Y. 42;

Highland Farms Dairy v. Agnew, 300 U. S. 608; Henneford v. Silas Mason Co., 300 U. S. 577; New York ex rel Cohn v. Graves, 300 U. S. 308; Campbell vs. Haverhill, 155 U. S. 610, 39 L. Ed. 280; 15 Sup. Ct. 217; Maloney, Attorney General of Illinois vs. American Tobacco Co., 221 U. S. 106; McKenny vs. Kansas Natural Gas Co., 206 Fed. 772; Clark on Receivers, Vol. I, Sec. 243, p. 332; United States vs. Union Pacific Railway, 226 U. S. 98; Carpenter vs. Strange, 141 U. S. 87, 105; First National Bank vs. Maine, 284 U. S. 312; York vs. Texas, 137 U. S. 15, 11 Sup. Ct. 9; Kauffman vs. Wooters, 138 U. S. 285, 11 Sup. Ct. 298; State vs. Racine, 63 Texas Court of Appeals, 663, 134 S. W. 400; 41 Corpus Juris 127; Manners v. Morosco, 258 Fed. 357, affirmed 2522 U. S. 317; Drone on Copyright, p. 337; Hossak v. Ottawa Association, 91 N. E. 439; Brown v. Harris Medical Society, 194 S. W. 1179; Kelsey vs. Grain Elevator, 206 S. W. 849; Dale Tile Mfg. Co. vs. Hayatt, 125 U. S. 46; Witteman Bros. v. Witteman Co., 151 N. Y. S. 814; New Marshall Engine Co. vs. Marshall Co., 223 U. S. 473; Montgomery Palace Stock Car Co. v. Car Line, 43 Fed. 321; Hartell v. Tilchman, 99 U. S. 547; Albright v. Teas, 106 U. S. 613; Becker v. Contoure Laboratories, 29 Fed. (2d) 31; Bouvier's Law Dictionary, "Assignment", page 264, Vol. I; Title 28, U. S. C. A., Notes 221 to 260, pages 108 to 122; DeCroisset et al. v. Vitagraph Co., 262 Fed. 100; Tulley v. Triangle Film Corp., 229 Fed. 297; KVOS Inc. v. Associated Press, 299 U. S. 269; Decision of Judge Augustus Hand, filed February 27, 1922. in United States v. Consolidated Music Corporation, U. S. District Court for the Southern District of New York; Parson v. Chicago, 138 Fed. 184, 186; Chicago etc. R. R. Co. v. Wiggins, 108 U. S. 18, 1 S. Ct. 614, 27 L. Ed. 636; Boise Artesian Hot and Cold Water Co. v. Boise City, 213 U. S. 276, 53 L. Ed. 796; Rogers v. Mattnews, 284 U. S. 521, 76 L. Ed. 447; Title 28, U. S. C. A., Sec. 384; Spielman Motor Sales Co. Inc. v. Dodge, 295 U. S. 89, 76 L. Ed. 1322; Bradford v. Hurd, 84 Fed. (2d) 722; Cleveland Cliffs Iron Co. v. Kinney, 262 Fed. 980; Riggs v. Johnson, 6 Wall. 166, 18 L. Ed. 768; Phelps v. Mutual Reserve Fund Life Assoc., 190 U. S. 147, 23

S. Ct. 707, 47 L. Ed. 987; Fisk v. Union Pac. R. Co., Fed. Cas. No. 4827; Smyth v. Asphalt Belt Ry. Co., 267 U. S. 326; 45 S. Ct. 242, 69 L. Ed. 629; Northport Power and Light Company v. Hartley, 283 U. S. 568, 75 L. Ed. 1275; Heald vs. Dist. of Columbia, 259 U. S. 114; Arizona Copper Co. v. Hammer, 250 U. S. 400; United States v. Interstate Circuit, Inc., 20 F. Supp. 868; Buck vs. DeBaun, 40 Fed. (2d) 734; Legislative Bill No. 478, Fifty-Second Session, Legislature of Nebraska; Henneford v. Northern Pacific, Montgomery's Manual, P. 161; Risty v. Chicago, R. I. & P. Ry. Co., 297 Fed. 710-722; Chicago, R. I. & P. Ry. Co. v. Risty, 282 Fed. 364, cert. denied, 266 U. S. 622.

Intervening Defendant John J. Lockhart cites: Love v. Kozy Theatre, 236 S. W. 245; Continental Co. v. Voight, 212 U. S. 227; Title 15, U. S. C. A., Sec. 17; Fisher's Blend Station v. Washington Tax Commission, 297 U. S. 650; Straus v. American Book Publishers, 231 U. S. 231; National Harrow v. Hench, 83 Fed. 36; Goldwyn Pictures vs. Howells, 282 Fed. 9; Corpus Juris, Vol. 13, p. 1106; Photo-Drama et al. vs. Social Uplift Film Co., 213 Fed. 574; Witmark v. Pastime Theatre, 298 Fed. 470; New Fiction Pub. Co. v. Star Co., 220 Fed. 994; Bobbs-Merrill Co. v. Straus, 147 Fed. 15; Federal Baseball League vs. National League, 259 U. S. 200; Marienelia Limited v. United Booking Offices, 227 Fed. 165; United States v. Patten, 226 U. S. 543; Loewe v. Lawlor, 208 U. S. 274; Paramount v. United States, 282 U. S. 30; United States v. Northern Securities, 120 Fed. 721; Standard Oil vs. United States, 283 U. S. 163; Eastern States Retail Association v. United States, 243 U. S. 600; United States v. American Column Lumber Co., 263 Fed. 147, affirmed 257 U. S. 377; Northern Securities vs. United States, 193 U. S. 197; Addyston Pipe Co. vs. United States, 85 Fed. 291.

CUSHMAN, District Judge:

Section 266 of the Judicial Code (Title 28, U. S. C. A., § 380), in part, provides:

* * * * * * *

"It is further provided that if before the final hearing of such application a suit shall have been brought in a court

of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State."

* * * * * * * *

As already stated, the prayer of the Complaint, in part, is that defendants:

* * * * * * * *

"be enjoined and restrained by temporary and permanent order of injunction of this court, from bringing, directly or indirectly, and from permitting to be brought, directly or indirectly, any proceeding at law or in equity for the purpose of enforcing said Statute, Chapter 218 of the laws of 1937 of the State of Washington, against the complainants and others similarly situated, representatives, employees, agents or any of them, including the Society, as and when said Statute goes into effect. * * *"

By the foregoing it appears that a, if not the, major purpose of the Bill is to deprive the State courts of an opportunity to exercise the jurisdiction saved to them by the express terms of the Act under which this court was created and under which complainants ask it to enjoin defendants from bringing such authorized suits in a court of the State.

In view of the conclusion herein reached it will not be determined whether, under such circumstances, the court should attempt to spell out jurisdiction of other parts of this suit.

As already stated, each one of the defendants, in the motion to dismiss, state:

* * * * * * * *

"4. That defendants assert that they do not intend to enforce the criminal penalties of the act until the validity of the act is adjudged."

* * * * * * * *

The consideration of the effect of this disclaimer upon the jurisdiction of the Court as a court of equity (Spielman Motor Co. v. Dodge, 295 U. S. 89-96) should in any event be deferred until the court determines its jurisdiction as a district court.

The Bill must allege affirmatively and distinctly whatever is essential to the Court's jurisdiction, Smith v. McCullough, 270 U. S. 456-459; Norton v. Larney, 266 U. S. 511-515, and, if the allegations of the Bill as to jurisdictional facts are by the defendants challenged in an appropriate manner, complainants must support them "by competent proof", McNutt v. General Motors Acceptance Corp., 298 U. S. 178-189.

There is no question but that the motion of the defendants to dismiss, denying that the matter in controversy exceeds $3,000.00 exclusive of interest and costs, was sufficient at the hearing had to place upon complainants the burden of so establishing that it is in excess of such amount.

The Bill of Complaint alleges that Chapter 218 is unconstitutional:

* * * * * * *

"in that it deprives complainants of their liberty and property without due process of law and the equal protection of the laws, impairs the obligation of contract, destroys the rights of complainants in their copyrighted works, nullifies valid contracts theretofore entered into, interferes with the Federal judicial power, destroys the privileges and immunities granted to complainants, and attempts to subordinate the Federal Constitution and the Copyright Act to the State of Washington, and complainants to an unreasonable search and seizure of their properties, effects, papers and persons."

* * * * * * *

By the foregoing it is made to appear that complainants invoke the protection of the 14th Amendment, Article I, Section 8, Clause 8, Section 10, Clause 1, Article 3, Section 2, Clause 1, Article 4, Section 2 and Article 6, Clause 2 of the Constitution.

The suit, as made by the Bill, is one concerning a State legislative enactment affecting property in copyrights because of conduct of those owning and interested in them—conduct beyond and apart from rights granted by copyrights. The owner of a copyright, because of conduct prohibited by law, may lose it. The question is whether the conduct by this statute forbidden is within the police power of the State to proscribe.

It follows that the suit is one under the Fourteenth Amendment rather than one arising under the copyright laws of the United States and that the amount in controversy to give the court jurisdiction must be in excess of $3,000.00, exclusive of interest and costs.

The non-profit sharing complainant Society, on behalf of whose members it is claimed the Bill is filed, has not the requisite amount of pecuniary interest. KVOS, Inc. v. Associated Press, 299 U. S. 269-278. The transfer to the Society by the members of their rights for such of the total (less expense) realized from the pooled license fees as a committee of the Society shall determine does not affect the pecuniary interest of the Society.

Concerning the aggregating of the claims of the members of the complainant Society in determining the amount in controversy, neither practice nor rule of the committee concerning the apportioning among the Society's members of the pooled license fees realized is shown. It appears to be a part of the contention made by the defendants that such division is inequitable and to the advantage of those directly concerned with the management of the affairs of the Society. It also appears that such distribution may be of license fees secured throughout the country rather than from within the State. A common interest among the members warranting an aggregating of their claims for such purpose has not been shown.

Concerning the competency of the verified Bill and affidavits, Equity Rules 73 and 48 provide:

"Rule 73. Preliminary Injunctions and Temporary Restraining Orders.

No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining order be granted without notice to the opposite party,

unless it shall clearly appear from the specific facts, shown by affidavit or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency specified, the matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of the order, and shall take precedence of all matters, except older matters of the same character. When the matter comes up for hearing the party who obtained the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the court shall dissolve his temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order, the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require. Every temporary restraining order shall be forthwith filed in the clerk's office."

"Rule 48. Testimony of Expert Witnesses in Patent and Trade Mark Cases.

In a case involving the validity of scope of a patent or trade-mark, the district court may, upon petition, order that the testimony in chief of expert witnesses, whose testimony is directed to matters of opinion, be set forth in affidavits and filed as follows: Those of the plaintiff within forty days after the cause is at issue; those of the defendant within twenty days after plaintiff's time has expired; and rebutting affidavits within fifteen days after the expiration of the time for filing original affidavits. Should the opposite party desire the production of any affiant for cross-examination, the court or judge shall, on motion, direct that said cross-examination and any re-examination take place before the court upon the trial, and unless the affiant is produced and submits to cross-examination in compliance with such direction, his affidavits shall not be used as evidence in the cause."

Rule 29 of the Rules of this—the District—Court, provides:

"Rule 29. Injunctions.

Proceedings for injunctions are governed by the practice in equity in the Federal Courts. No application for a preliminary injunction or restraining order will be entertained, by the Court or Judge, until after a bill in equity has been filed in the clerk's office and a subpoena issued thereon. No preliminary injunction shall be granted without notice to the opposite party; nor shall any temporary restraining order be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that irreparable injury will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency above specified, the matter shall be made returnable on the earliest day that the business of the Court will admit of, and if practicable, not later than the succeeding law and motion day, which is to be held, and shall take precedence of all other matters on the calendar of said day, except older matters of the same character, and matters to which special precedence may be given by the order of the Court. When the matter first comes up for hearing the party who obtained the temporary restraining order shall be required to be ready to proceed with his application for a preliminary injunction, and if he be not ready the Court may dissolve his temporary restraining order. The defendant, however, shall be entitled as of course to one continuance for a reasonable period, if he desires it, to enable him to meet the application for the preliminary injunction. The defendant may, without notice, when the matter first comes up in court, or at any subsequent hearing, present affidavits relating to the continuance or modification of the temporary restraining order as distinct from the application for the injunction, and the restraining order may be dealt with separately in the discretion of the Court."

* * * * * * *

No temporary restraining order was granted in this cause. Rule 48, in effect, excepts the cases therein described from the general rule. Rule 73 and Rule 48 are both new rules promulgated since the adoption of Rule 29 of this Court. Rule 29 is not at variance with Rule 73. If it was, Rule 73 would of course control.

In view of the foregoing, it is clear that there is no competent evidence showing that the matter in controversy exceeds, exclusive of interest and costs, $3,000.00. See also Title 28, U. S. C. A., §§ 381, 639, 723 and 730.

The affidavits in support of the Bill may, upon such a hearing, be considered as preliminary pleadings for the purpose of determining what, if any, matters are in dispute, but they and the verified Bill are, if denied, incompetent as evidence.

If the competency of the allegations of the Bill and affidavits be assumed, they still fail to clearly and distinctly show that the jurisdictional amount is in controversy, for while the owners of copyrights may be assumed to have knowledge concerning the extent of their ownership, there can be no presumption that they are qualified to express an opinion concerning the cost of complying with the requirements of Section 4 of the Act, nor would the Court, without more, be warranted in accepting, without opportunity for cross-examination, the statement of an owner as to the value of his property unless it was a statement against interest.

As already shown (by the quoted prayer of the Complainants) this suit was brought before the statute went into effect. Consequently no penalties could have been incurred under the act at the time of the institution of the suit. See Healy v. Ratta, 292 U. S. 263-268.

The injunction prayed will be denied and defendants' motion to dismiss, as not within the jurisdiction of the Court, will be granted.

If additional orders or rulings are desired, motions therefor may be noted for hearing at the settlement of orders based upon the foregoing ruling, which will also be upon notice.

The Clerk is directed to notify the attorneys for the parties of the filing of this decision.

BERT EMORY HANEY,
Circuit Judge.
EDWARD E. CUSHMAN,
District Judge.
JOHN C. BOWEN,
District Judge.

APPENDIX "C".

Opinion of February 9th, 1938, Requesting Additional Briefs on Jurisdictional Amount.

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

IN EQUITY.

No. 606.

GENE BUCK, Individually, etc., et al., *Complainants,*

vs.

OTTO CASE, as State Treasurer, etc., et al., *Defendants;* KMO, INC., a Corporation, *Intervening Defendant;* JOHN G. LOCKHART, *Intervening Defendant.*

Before Haney, Circuit Judge, and Cushman and Bowen, District Judges.

Seattle, Washington,
February 9th, 1938,
10:00 o'clock A. M.

Judge HANEY:

We have asked counsel—or as many as we could reach of counsel—in the case of Buck et al. vs. Case et al., Number 606, pending in the Court at Tacoma, to appear here this morning.

Earlier we had thought we might ask for re-argument with respect to some questions in that case, but because counsel are so widely dispersed it seems rather unnecessary for us to ask for re-argument.

We do wish to say to such of counsel as are present—and I observe some of them are present—that we think that the right or object to be protected against unconstitutional interference is the right to be free from that interference; we think that the matter in controversy in the instant case is Complainant's right to carry on its business free of the regulation imposed by the Washington statute. The value of that right is the thing that is to be measured by the $3000 limit imposed by the Federal statute.

We invite additional briefs addressed:

(a) To the value of that right,

(b) To where that value may be found in the record.

Such additional briefs may be filed within twenty days from this date by any parties to the litigation, and we direct attention to:

Henneford vs. Northern Pacific Railway Company decided by the Supreme Court January 31st, 1938; KVOS vs. Associated Press, 299 U. S. 269, and McNutt vs. General Motors, 298 U. S. 178. That is all.

We think—that there may be no misunderstanding—that the Clerk should notify all counsel so if counsel are not present they may have an opportunity, if they desire, to file additional briefs on these questions.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 329

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL., *Appellants,*

vs.

PHIL GALLAGHER, AS STATE TREASURER OF THE STATE OF WASHINGTON, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

APPELLANTS' REPLY BRIEF ON QUESTION OF JURISDICTION.

THOMAS G. HAIGHT,
LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 329

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS; CARL FISCHER, INC., G. SCHIRMER, INC., IRVING BERLIN, INC., DEEMS TAYLOR, OLEY SPEAKS, WILLIAM J. HILL, ANNE PAUL NEVIN, ELLA HERBERT BARTLETT AND JANE SOUSA,

Appellants,

vs.

PHIL GALLAGHER, AS STATE TREASURER OF WASHINGTON; CLIFF YELLE, AS STATE AUDITOR OF WASHINGTON; ERNEST N. HUTCHINSON, AS SECRETARY OF THE STATE OF WASHINGTON; G. W. HAMILTON, AS ATTORNEY GENERAL FOR THE STATE OF WASHINGTON; B. GRAY WARNER, AS DISTRICT ATTORNEY OF KING COUNTY OF WASHINGTON; HARRY H. JOHNSTON, AS DISTRICT ATTORNEY OF PIERCE COUNTY OF WASHINGTON; RALPH E. FOLEY, AS DISTRICT ATTORNEY OF SPOKANE COUNTY OF WASHINGTON; A. W. SWANSON, AS DISTRICT ATTORNEY OF SNOHOMISH COUNTY OF WASHINGTON; H. W. COVALT, AS DISTRICT ATTORNEY OF WHATCOM COUNTY OF WASHINGTON; SMITH TROY, AS DISTRICT ATTORNEY OF THURSTON COUNTY OF WASHINGTON; PAUL O. MANLEY, AS DISTRICT ATTORNEY OF GRAYS HARBOR COUNTY OF WASHINGTON; JOHN D. EVANS, AS DISTRICT ATTORNEY OF YAKIMA COUNTY OF WASHINGTON; GLENN L. BEAN, AS DISTRICT ATTORNEY OF WALLA WALLA COUNTY OF WASHINGTON; SAM M. DRIVER, AS DISTRICT ATTORNEY OF CHELAN COUNTY OF WASHINGTON; K. M. O. INC., A CORPORATION; JOHN G. LOCKHART,

Appellees.

APPELLANTS' REPLY BRIEF ON QUESTION OF JURISDICTION.

Appellees' position is that because the court below declined to grant an interlocutory injunction, but on the contrary entered a final decree dismissing the bill of complaint, for alleged failure to set forth that the requisite jurisdictional amount was involved, this Court is without jurisdiction to review such holding on a direct appeal.

Appellees have confused jurisdiction of the Supreme Court, which is dependent upon the existence of a substantial Federal question, and jurisdiction of a Federal Court to entertain a bill. The important Federal question in this case is the constitutionality of a State Statute, Chapter 218, Laws of Washington 1937, p. 1070.

This Court has jurisdiction to review the decision below on direct appeal regardless of the ground upon which the bill was dismissed or the temporary injunction denied. Appellants have the same right to have the decision of the court below reviewed by this Court on direct appeal, irrespective of whether the decision was based on the merits or on the alleged insufficiency of the allegations of the bill respecting the jurisdictional amount. If this were not so, appellees would never be able to have the constitutionality of the Washington Statute here involved before this Court on direct appeal.

The question of whether the necessary jurisdictional amount has been established is one which this Court will review on appeal. *St. Paul Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283; *Wetmore* v. *Rymer*, 169 U. S. 115, 119.

The cases cited by appellees go no further than to hold that a single Judge has the preliminary right to determine whether the bill presents a substantial Federal question.

In the case at bar, a single Judge (Judge Cushman), in the first instance, did determine that a substantial Federal question was presented by directing that the motion for a temporary injunction be heard before a court of three judges. The three-judge court did not hold that a substantial Federal question was not presented. It dismissed the bill and denied the temporary injunction solely on the ground "that neither the allegations of the bill of complaint nor the record shows that the value of the matter in controversy, exclusive of interest and costs, exceeds $3,000."

Appellants contend that the court erred in dismissing the bill and denying a temporary injunction on this ground; that the bill showed that the amount involved was in excess of $3,000; that these allegations were supported by affidavits and that appellants offered to further support these affidavits by oral testimony, which offer was refused by the court below; and that the Statute is a clear invasion of appellants' rights under the Federal Constitution, and that the decree should be reversed and the case remanded to the court below with instructions to that court to consider appellants' motion for an interlocutory injunction on its merits.

If this Court should find, as appellants contend, that the complaint does contain sufficient allegations to support the claim of the necessary jurisdictional amount and if this Court should further find that there is a substantial Federal question involved, it will be necessary to reverse and send the case back to the three-judge court below for a consideration of the merits of appellants' motion for an interlocutory injunction. *Cuyahoga Power Co.* v. *Akron*, 240 U. S. 462, 463.

Appellees completely ignore appellants' contention that the court below had jurisdiction regardless of the amount involved in view of the substantial claim that the State Statute denies equal protection of the laws and denies to complainants certain privileges and immunities of citizens of the

United States (*cf.* "Question 2" of appellants' "Statement as to Jurisdiction", p. 14, citing *Raich* v. *Truax*, 219 Fed. 273, 283, aff'd 239 U. S. 33). If this contention be sustained this Court likewise must reverse the decree below and remand the cause for consideration of appellants' motion for interlocutory injunction by a court of three judges pursuant to Section 266 of the Judicial Code (Title 28, U. S. C., § 380).

Unless this Court entertains this appeal, appellants will be denied the right to review the action of the court below and to have the case sent back to that court for appropriate action. No writ of certiorari can be applied for because the decree appealed from was made by a district court and not by a circuit court of appeals. Appellants may not appeal to the Circuit Court of Appeals because the proceeding below was one that could be heard only before a court of three judges under Section 266 of the Judicial Code, from whose decree an appeal lies only to this Court. This Court alone is vested with jurisdiction to correct the decision below in the manner prescribed by Section 266 of the Judicial Code. The cases cited in both appellants' and appellees' briefs support the jurisdiction of this Court.

Respectfully submitted,

THOMAS G. HAIGHT,
LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
Counsel for Appellants.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 329

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, *et al.*,
Appellants,

v.

PHIL H. GALLAGHER, Individually and as State Treasurer of the State of Washington, *et al.*,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

ANSWER OF APPELLANTS TO MOTION OF APPELLEE G. W. HAMILTON TO DISMISS THE APPEAL.

THOMAS G. HAIGHT,
LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
Counsel for Appellants.

APPELLATE LAW PRINTERS, INC., 103 Lafayette Street, N. Y.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 329

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, et al.,

Appellants,

v.

PHIL H. GALLAGHER, Individually and as State Treasurer of the State of Washington, *et al.*,

Appellees.

ANSWER OF APPELLANTS TO MOTION OF APPELLEE G. W. HAMILTON TO DISMISS THE APPEAL.

Appellants, Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, Carl Fischer, Inc., G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, answering the motion of appellee G. W. Hamilton, Attorney General of the State of Washington to dismiss the appeal herein, respectfully show:

1. This answer will present both the facts and the law relating to appellee's motion.

2. The motion to dismiss herein is based upon three grounds, to wit: (a) That the Governor of the State of Washington has not been made a party and is allegedly an indispensable party; (b) That certain state and county officers sued as defendants herein had ceased to hold office prior to or during the pendency of this action, and that their successors have not been substituted; (c) That no citation on appeal has been served upon the Attorney General of the State of Washington, or upon his attorney. Each of these matters will be taken up in succession.

3. The Governor of the State of Washington was not an indispensable party defendant for the following reasons:

(a) Under Section 266 of the Judicial Code (Tit. 28 U. S. C., §380) it is not necessary to make the Governor a party. That section merely requires that the application for a temporary injunction "shall not be heard or determined before at least five days' notice of the hearing has been given to the Governor and to the Attorney General of the State, and to such other persons as may be defendants in the suit."

(b) Copies of the notice of hearing of the application for temporary injunction pursuant to Section 266 of the Judicial Code, together with the complaint, motion papers and order of the District Court dated June 9, 1937, directing such hearing were served on the Governor of Washington on June 12, 1937 (17 days before the date fixed for hearing the motion for interlocutory injunction). Such notice and order are made a part hereof as Exhibits "1" and "2", respectively.* They appear in the transcript at pp. 234-238.

*All exhibits are bound in a separate volume submitted herewith and made a part hereof.

The affidavit of service of such papers is annexed hereto as Exhibit "3".

(c) The moving papers admit that due notice was given, but they complain that there is a defect of parties because the Governor was not made a party defendant. Appellee relies on Article III of the Washington State Constitution which imposes on the Governor the obligation to *"see that the laws are faithfully executed,"* this language having been substantially copied from Article II, Section 3 of the Federal Constitution which charges the President of the United States with the same duty. It has long been held, however, that superior officers charged with a *general* duty of supervising law enforcement need not be made parties defendant where the officer charged with *actual* enforcement of a statute is before the court. *Colorado* v. *Toll*, 268 U. S. 228, 230; *Ryan* v. *Amazon Petroleum Corp.*, 71 F. (2d) 1, 4 (injunction granted 293 U. S. 388); *Berdie* v. *Kurtz*, 75 F. (2d) 898 (C. C. A. 9); *Darger* v. *Hill*, 76 F. (2d) 198 (C. C. A. 9); *Yarnell* v. *Hillsborough Packing Co.*, 70 F. (2d) 435 (C. C. A. 5); *Consolidated Freight Lines* v. *Pfost*, 7 F. S. 629, 630 (D. C. Idaho); *Consolidated Gas Co.* v. *Hardy*, 14 F. S. 223, 225 (S. D. N. Y.); *Chester C. Fosgate Co.* v. *Kirkland*, 19 F. S. 152, 156, 158 (S. D. Fla.); *cf. Ickes* v. *Fox*, 300 U. S. 82, 96-7. In any event the objection that there is a defect of parties is addressed to the discretion of the Court and not to its jurisdiction. *Rood* v. *Goodman*, 83 F. (2d) 28, 32 (C. C. A. 5).

(d) Appellee relies on *Arneson* v. *Denny*, 25 F. (2d) 993 (D. C. Wash.), and *State ex rel Reed* v. *Gormley*, 40 Wash. 601, to support his claim that the Governor should be made a party defendant. In the *Arneson* case, the notice to the Governor was held insufficient because it did not inform him of the particular law as to which enforcement was sought to be enjoined, nor of the particular official

acts sought to be enjoined, nor on what grounds such law was claimed to be unconstitutional; nor was the Governor served with the order of the court setting the motion down for hearing; nor were the complaint or the motion papers served upon him. In the case at bar, the notice to the Governor was full and complete (Ex. "1", Tr. 234). The order setting the case down for hearing on the motion for interlocutory injunction (Ex. "2", Tr. 210), as well as the bill of complaint and motion papers were served upon the Governor, together with the notice (affidavit of service, Ex. "3").

(e) Appellants herein followed the procedure approved by a statutory court in *Consolidated Freight Lines* v. *Pfost*, 7 F. Supp. 629, 630 (D. C. Idaho), where the court distinguished the *Arneson* case on the ground that the statutory notice there was insufficient. Section 266 of the Judicial Code does not require that the Governor be made a party, nor did the order of Judge CUSHMAN, directing service upon the Governor of the complaint and moving papers, require that the Governor be made a party.

(f) *State ex rel. Reed* v. *Gormley*, 40 Wash. 601, upon which appellee relies, is not in point. There, an action was brought to restrain the board of county commissioners from honoring certain warrants theretofore issued by them. The person to whom the warrants were originally issued was made a defendant, but prior to the commencement of the action the warrants had been transferred and the transferees were not made parties. The court dismissed the action, on the ground that the present holders of the warrants were indispensable parties defendant because the action sought to affect their property rights. In the case at bar, there is no attempt to affect any rights whatsoever of the Governor of the State of Washington, as the above cases clearly show.

Since the bill of complaint does not allege any cause of action against the Governor, it is not necessary to make him a party. *Mechanics' Bank* v. *Seton*, 1 Pet. 299, 306.

(g) The moving appellee made a motion in the court below to dismiss the complaint herein, on the grounds that the court below lacked jurisdiction, that there was a *mis*-joinder of parties plaintiff, and that the complaint failed to show facts sufficient to entitle complainants to equitable relief (Ex. "5", Tr. 285-290). But no claim of *non*-joinder of parties *defendant* was made in that motion. Accordingly, any objection on that ground has been waived. In any event, since the defect of parties, if any, existed before the decree below was entered, the objection cannot be raised for the first time on appeal. *International News Service* v. *Associated Press*, 248 U. S. 215, 233 (1918); *cf.* Equity Rule 44.

(h) The Governor of the State of Washington does not appear upon this motion and does not claim any prejudice by reason of appellants' failure to make him a party defendant.

4. The claim of appellee G. W. Hamilton that the present State Treasurer Phil H. Gallagher is not a party defendant-appellee is without merit for the following reasons:

(a) Although Otto Case was originally named as a defendant as the State Treasurer of the State of Washington, appellants learned after the complaint and motion papers were served on the other defendants that Otto Case had been succeeded in the office of State Treasurer by Phil H. Gallagher.

(b) This matter was called to the attention of Alfred Schweppe, Esq., counsel for the defendants, and it was agreed that Phil H. Gallagher could be served as a defendant under the designation "John Doe". Subsequently, a notice of appearance was entered on behalf of Phil H.

Gallagher, his name having been substituted by the *defendants'* counsel in such notice of appearance in place and stead of Otto Case as State Treasurer of Washington. (Such notice of appearance is annexed hereto as Exhibit "4", and appears in the transcript at pp. 545-6).

(c) The Attorney General was a party to that notice of appearance, individually and by several other attorneys, including Alfred J. Schweppe, Esq., who actively conducted this litigation throughout on behalf of the Attorney General and all the other defendants-appellees in this case.

(d) Thereafter, the defendants, including the Attorney General, moved to dismiss the complaint herein (Tr. 285-290). Said motion is annexed hereto as Exhibit "5". The caption of that motion includes "Phil H. Gallagher, as State Treasurer of Washington", among the defendants (Tr. 285).

(e) The notice under Rule 12, paragraph 2 of the Rules of this Court contains an acknowledgment of service on August 4, 1938, by Alfred J. Schweppe, Esq., as *counsel for "Phil H. Gallagher, sued herein as 'John Doe'"*, among others (Tr. 543). A copy of said notice under Rule 12, together with the acknowledgment of service is made a part hereof as Exhibit "6".

(f) The answer filed in this Court by appellees in opposition to appellants' Statement as to Jurisdiction (Exhibit "7" hereto annexed) is signed by counsel as "Solicitors and Attorneys for Appellees" (Tr. 555). Phil H. Gallagher was included as one of the appellees.

(g) The citation on appeal is directed to Phil H. Gallagher, among other defendants (Tr. 552). A copy of such citation is annexed hereto as Exhibit "8".

(h) Until this motion was made there was no suggestion or hint that Phil H. Gallagher was not a party defendant-appellee in this action.

5. The failure to bring in Lynn G. Gimmell, successor to defendant-appellee Sam M. Driver, as District Attorney of Chelan County as a party defendant does not abate the action as to the remaining defendants-appellees.

(a) Sam Driver was named as a defendant-appellee as the District Attorney for Chelan County. It now appears in the motion papers herein that said Sam Driver resigned his position as District Attorney, and was succeeded by one Lynn G. Gimmell on April 1, 1937, prior to the commencement of this action.

(b) Appellants and their counsel did not know of the resignation of said Sam M. Driver, and were led to believe that he was still the District Attorney of Chelan County when this action was instituted by reason of the fact that an appearance was entered on his behalf by Alfred J. Schweppe, Esq., and the other attorneys in this case, such notice of appearance having been filed in the court below on June 28, 1937 (Tr. 545-6). *The name "Sam M. Driver" is listed as one of the defendants in the caption of such notice of appearance, and the notice is on behalf of all defendants.*

(c) The same applies to the motion to dismiss the complaint filed in the court below made on behalf of all defendants, including said Sam M. Driver (Tr. 285-290).

(d) The citation on appeal likewise is directed to said Sam M. Driver (Tr. 552, Exhibit "8" hereof), and service of the notice under Rule 12 of the Rules of this Court is acknowledged by said Alfred J. Schweppe, Esq., as counsel for Sam M. Driver, among others (Tr. 542, at 543).

(e) It is now stated for the first time that the attorneys for the defendants-appellees were not authorized to appear on behalf of said Sam M. Driver because of his resignation and the appointment of a successor as District Attorney of Chelan County prior to the commencement of this action.

It is too late now to substitute Mr. Driver's successor in office under Section 11 of the Act of February 13, 1925 (Tit. 28 U. S. C., §780), Rule 19, Subdivision 4 of the Rules of this Court and Rule 25, Subdivision (d) of the New Rules of Civil Procedure, since more than six months have elapsed since the appointment of such successor.

(f) The State Statute of the State of Washington against which the enforcement of this action is directed (Session Laws of Washington, 1937, Chapter 218, pp. 1070-1085, inclusive), imposes the duties of enforcement on the prosecuting attorneys of the several counties where offenses under the Statute may have been committed.

(g) The presence of Sam M. Driver as a defendant is not necessary in order to determine the controversy or do justice between appellants and the appellees, other than said Sam M. Driver.

(h) Under the circumstances, it is respectfully urged that said Sam M. Driver be dropped from this action under Rule 21 of the New Rules of Civil Procedure, and that this action and this appeal continue without him since he is not an indispensable party.

6. The failure to bring in Lloyd L. Wiehl, successor to defendant-appellee John D. Evans, as District Attorney of Yakima County as a party defendant does not abate the action as to the remaining defendants-appellees.

(a) The affidavit submitted in support of the motion to dismiss, states that defendant-appellee John D. Evans, referred to in this suit as District Attorney of Yakima County, was never at any time such District Attorney, and that at the time of the commencement of this action one *Robert J. Willis* was District Attorney of Yakima County and was succeeded on September 7, 1937, by Lloyd L. Wiehl (Motion to Dismiss, p. 8).

(b) The notice of appearance referred to above which was entered by the "Solicitors and Attorneys for the Defendants", substituted Robert J. Willis in the title of the action as the District Attorney of Yakima County in place of said John D. Evans. This substitution was not noticed by counsel for complainants-appellants, and all subsequent papers in the case, including defendants' motion to dismiss the complaint in the court below, included the name "John D. Evans" in the caption as District Attorney of Yakima County (see Tr. 285-290).

(c) Alfred J. Schweppe, Esq., acknowledged service of the notice under Rule 12 on behalf of the appellees, including "John D. Evans, as District Attorney of Yakima County of Washington" (Tr. 543).

(d) Since it now appears that John D. Evans is not the District Attorney of Yakima County and that more than six months have elapsed since the appointment of Lloyd L. Wiehl as such District Attorney on September 7, 1937, we respectfully urge that said John D. Evans be dropped from this action.

(e) As in the case of the said appellee Sam M. Driver, District Attorney of Chelan County, the presence of John D. Evans or of Lloyd L. Wiehl is not necessary to make a proper determination of the controversy between appellants and the remaining appellees.

7. The failure to bring in Belle Reeves, successor to defendant-appellee Ernest N. Hutchinson, as Secretary of State of the State of Washington as a party defendant does not abate the action as to the remaining defendants-appellees.

(a) Defendant-appellee Ernest N. Hutchinson died on January 30, 1938, according to the affidavit submitted in support of the motion to dismiss this appeal, and was succeeded by one Belle Reeves and qualified on February 7, 1938 (pp. 8-9).

(b) No Suggestion of Death was filed, and counsel for appellants did not become aware of the death of said Ernest N. Hutchinson until receiving a copy of said affidavit of John Egan Belcher on or about October 11, 1938.

(c) Since more than six months have elapsed since the death of Ernest N. Hutchinson and the appointment of his successor, it is now too late to bring in such successor under Section 11 of the Act of February 13, 1925 (Tit. 28 U. S. C. §780), Rule 19, Subdivision 4 of the Rules of this Court and Rule 25, Subdivision (d) of the New Rules of Civil Procedure.

(d) The only duties imposed by the Statute upon the Secretary of State are ministerial. The lists of copyrighted works required under Sections 4 and 5 of the State Statute must be filed in the office of the Secretary of State who shall make them available for public examination, and may publish the same in newspapers. Wherever service of process is made under the Statute on non-residents, a copy thereof must be filed in the office of the Secretary of State. The Secretary of State has no power to enforce the Statute.

(e) Since the sole object of this suit is to restrain *enforcement* of the Statute, the Secretary of State is not an indispensable or even a necessary party, and this suit and the appeal herein should proceed in his absence.

8. The claim that neither appellee, G. W. Hamilton, Attorney General, nor his attorney were served with the citation on appeal herein is unfounded for the following reasons:

(a) Throughout all the proceedings herein the Attorney General was represented by Special counsel, *Alfred J. Schweppe, Esq.*, who actively conducted the defense of this action on his behalf, made all the arguments on behalf of the Attorney General in open court, and acted on behalf of the Attorney General in serving and accepting papers in this suit.

(b) Mr. Schweppe not only represented the Attorney General of the State of Washington in this suit, but he also represented the Attorney General and other officers of the State of *Montana* in a suit by these same appellants, challenging the validity of a similar statute enacted in that State (ch. 90 Laws of Montana, 1937). The main argument on behalf of the defendants in opposition to the motion for a temporary injunction to restrain the enforcement of the Montana Statute was made by Mr. Schweppe on April 23, 1937, before a court consisting of Honorable Bert Emory Haney, Circuit Judge, Honorable Charles N. Pray and Honorable James H. Baldwin, District Judges.*

(c) Under the circumstances, appellants were justified in relying upon the authority of Mr. Schweppe to represent the appellee, Hon. G. W. Hamilton, Attorney General of the State of Washington, as well as the other appellees.

(d) The notice of appearance filed in the court below on June 28, 1937, is signed by Alfred J. Schweppe, Esq., among others, as solicitor and attorney for all the defendants (Tr. 545-6).

(e) The motion to dismiss on behalf of all the defendants is signed by Alfred J. Schweppe, Esq., among others, as solicitor and attorney for all the defendants (Tr. 285-290).

(f) At the hearing held on February 9, 1938, in the court below with reference to the question of jurisdiction, the only person representing the defendants, other than the intervening defendants, was said Alfred J. Schweppe, Esq. (Tr. 331, Exhibit "9", hereto annexed).

(g) The citation on appeal and other papers on appeal were served on Alfred J. Schweppe, Esq., as attorney for all the defendants, other than the intervening defendants (Tr. 552-54, Affidavit of Service, made a part hereof as Exhibit "10").

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* The United States District Court for Montana has not yet decided the motion for interlocutory injunction argued April 23, 1937 (*Carl Fischer, Inc.* v. *Shannon*, D. C. Mont. Docket No. 1537).

(h) Said Alfred J. Schweppe, Esq., acknowledged service of the notice under Rule 12 as attorney for "G. W. Hamilton, as Attorney General for the State of Washington," among others (Tr. 542-4, at 543, Exhibit "6", hereof).

This admission reads as follows (Italics ours):

"Service acknowledged this 4 day of August, 1938.

[Signed] ALFRED J. SCHWEPPE
Counsel for Appellees Cliff Yelle, as State Auditor of Washington; *Ernest N. Hutchinson, as Secretary of the State of Washington; G. W. Hamilton, as Attorney General for the State of Washington;* R. Gray Warner, as District Attorney of King County of Washington; Harry H. Johnston, as District Attorney of Pierce County of Washington; Ralph E. Foley, as District Attorney of Spokane County of Washington; A. W. Swanson, as District Attorney of Snohomish County of Washington; H. W. Covalt, as District Attorney of Whatcom County of Washington; Smith Troy, as District Attorney of Thurston County of Washington; Paul O. Manley, as District Attorney of Grays Harbor County of Washington; *John D. Evans, as District Attorney of Yakima County of Washington;* Glenn L. Bean, as District Attorney of Walla Walla County of Washington; *Sam M. Driver, as District Attorney of Chelan County of Washington; Phil H. Gallagher, sued herein as "John Doe".*

[Signed] C. C. DILL,
KENNETH DAVIS,
LEO TEATS,
Counsel for Appellee by LEO TEATS,
K. M. O. Inc.

[Signed] CLARK R. BELKNAP,
Counsel for Appellee John G. Lockhart."

(i) The stipulation with respect to the record on appeal is signed by Alfred J. Schweppe, Esq., and his firm, McMicken, Rupp & Schweppe, as "Counsel for defendants-appellees" without limitation (Tr. 547, at 548, Stipulation made a part hereof as Exhibit "11").

(j) The affidavit of Mr. Belcher submitted in support of the motion to dismiss this appeal states that said John Egan Belcher "is *one* of the attorneys of record for all state officers sued herein in their official capacities, and individually" (p. 7). But in that affidavit he does not deny that Mr. Schweppe was also authorized to act on behalf of the Attorney General. The fact is, that Mr. Belcher never took any active part in this litigation, and that counsel for appellants at all times believed that the Attorney General had entrusted the active conduct of this litigation to Alfred J. Schweppe, Esq., with whom at all times they dealt as the representative of said Attorney General.

(k) Notwithstanding the fact that the Attorney General of the State of Washington was at all times represented by Mr. Schweppe as aforesaid, a printed copy of the Statement as to Jurisdiction, together with appellants' Reply Brief on the Question of Jurisdiction in this Court was sent to Mr. G. W. Hamilton as soon as the same were received by him from the Clerk of this Court. (Affidavit of Herman Finkelstein annexed hereto as Exhibit "12").

(l) Upon receiving the motion herein, H. W. Haugland, Esq., of Seattle, Washington, one of the local counsel in this case in the court below, was requested by counsel who are conducting this appeal on behalf of appellants, to cause a copy of the petition for appeal, order allowing appeal, citation on appeal and notice under Rule 12, paragraph 2 of the Rules of this Court to be served personally on the said appellee, Honorable G. W. Hamilton. All such papers were served personally on said G. W. Hamilton on October 15, 1938, as appears from the affidavit of said H. W. Haug-

land, verified October 15, 1938, annexed hereto as Exhibit "13". Service of the citation upon the Attorney General, even though late should be regarded as sufficient under the circumstances, if such service was in fact necessary. *Jacobs* v. *George*, 150 U. S. 415, *Lockman* v. *Lang*, 132 Fed. 1 (C. C. A. 8).

(m) Even though the Attorney General's authorization of *Mr. Schweppe* to appear on his behalf did not give Mr. Schweppe a right to demand compensation from the State, nevertheless, he was authorized to and did represent the Attorney General in this litigation, and the Attorney General is bound by everything that Mr. Schweppe did on his behalf, including the acceptance of service of the citation and other papers on appeal herein. *Matter of Attorney General* v. *North Amer. Life Ins. Co.*, 91 N. Y. 57, 66 (1883); *In re Creighton*, 91 Neb. 654, 136 N. W. 1001; *McQuesten* v. *Attorney General*, 187 Mass. 185, 72 N. E. 965; *Edward Hines Yellow Pine Trustees* v. *Knox, Atty. General.*, 144 Miss. 560, 108 So. 907, 912. The case of *State* v. *Gattavara*, 182 Wash. 325, relied on by the Attorney General is not in point, inasmuch as the attorney in that case did not even purport to act on behalf of the Attorney General, and the Attorney General had not authorized him to act on his behalf.

(n) The motion to dismiss in the court below was signed by Mr. Schweppe on behalf of all the defendants, including the Attorney General. A representative of the Attorney General's office was in court when that motion to dismiss was argued, and when the decree granting that motion was entered. Mr. Schweppe's authority to make the motion to dismiss and thus to secure the decree appealed from was not challenged by the Attorney General in the court below. If Mr. Schweppe was authorized to act on the Attorney General's behalf in conducting the proceedings in the court below, he was authorized to act on the Attorney General's behalf in accepting service of the citation herein. *United States* v. *Curry*, 6 How. 106, 111.

9. This matter is of great consequence to appellants. They were diligent in instituting this suit, having brought the same on for hearing on June 29, 1937, within approximately two weeks after the effective date of the Statute. Due notice of the application for interlocutory injunction, together with the complaint and moving papers, were served on all parties, and upon the Governor of the State of Washington seventeen days before the hearing.

10. Prior to the hearing, appellants ceased all operations in the State of Washington, and have not enforced any of their contracts or made any new license agreements or received any payments from that State since that time, although they have in the past derived approximately $60,000 annually from that State (Compl. par. 26-28, Tr. 29-33).

11. Almost a year elapsed before the Court reached its decision dismissing the complaint for lack of jurisdiction. Up to the present time appellants have been deprived of all benefits under their contracts and under the Copyright Law in the State of Washington for the past sixteen months.

12. It is respectfully submitted that the ends of justice will be served by denying the motion of appellee, G. W. Hamilton, to dismiss the appeal herein, and by entering an order dropping the defendants-appellees, Sam M. Driver, John D. Evans and Ernest N. Hutchinson as parties defendant.

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13. The motion of appellee G. W. Hamilton to dismiss the appeal herein should be denied, and an order should be entered dropping the defendants-appellees Sam M. Driver, John D. Evans and Ernest N. Hutchinson, as parties defendant.

THOMAS G. HAIGHT,
LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
Counsel for Appellants.

October 21, 1938.

Exhibit "1".

NOTICE OF HEARING OF APPLICATION FOR INTERLOCUTORY OR TEMPORARY INJUNCTION FILED IN DISTRICT COURT JUNE 21, 1937

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON—SOUTHERN DIVISION.

GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, CARL FISCHER, INC., G. SCHIRMER, INC., IRVING BERLIN, INC., DEEMS TAYLOR, OLEY SPEAKS, WILLIAM J. HILL, ANNE PAUL NEVIN, ELLA HERBERT BARTLETT and JANE SOUSA,

Complainants,

vs.

OTTO CASE, as State Treasurer of Washington; CLIFF YELLE, as State Auditor of Washington; ERNEST N. HUTCHINSON, as Secretary of the State of Washington; G. W. HAMILTON, as Attorney General for the State of Washington; B. GRAY WARNER, as District Attorney of King County of Washington; HARRY H. JOHNSTON, as District Attorney of Pierce County of Washington; RALPH E. FOLEY, as District Attorney of Spokane County of Washington; A. W. SWANSON, as District Attorney of Snohomish County of Washington; H. W. COVALT, as District Attorney of Whatcom County of Washington; SMITH TROY, as District Attorney of Thurston County of Washington; PAUL O. MANLEY, as District Attorney of Grays Harbor County of Washington; JOHN D. EVANS, as District Attorney of Yakima County of Washington; GLENN L. BEAN, as District Attorney of Walla Walla County of Washington; SAM M. DRIVER, as District Attorney of Chelan County of Washington; "JOHN DOE" and "RICHARD ROE",

Defendants.

In Equity No. 606

To Honorable Clarence D. Martin, as Governor of the State of Washington; Honorable G. W. Hamilton, as Attorney-General of the State of Washington, and to each of the Defendants Named in the Above-Entitled Action:

You, and each of you, are hereby notified that the complainants in the above-entitled cause did, on the 28th day of May, 1937, file in the above-entitled court at Tacoma, Washington, a bill of complaint, supported by affidavit of Gene Buck, praying for a temporary and permanent injunction enjoining and restraining the defendants named in the above-entitled cause, and each of them, from bringing, directly or indirectly, any proceedings at law or in equity for the purpose of enforcing Chapter 218 of the Laws of 1937 of the State of Washington, relating to the use of copyrighted songs and music, against the complainants and others similarly situated, to which bill of complaint and affidavit on file in said cause, reference is hereby made, and that the complainants then moved the Court for a temporary injunction and requested that the same be heard and determined by three Judges, as provided by Section 380, Title 28 of the United States Codes Annotated, as amended.

You and each of you are further notified that the Honorable Edward E. Cushman, one of the United States District Judges for the District of Washington, on June 9, 1937, made an order setting the complainants' application for a temporary injunction in said cause for hearing before the Court at the court room in the Federal Building in the City of Tacoma, Washington, on June 29, 1937, at 10:00 o'clock A.M., before three Judges, consisting of the Honorable Bert Emory Haney, United States Circuit Judge for the Ninth Circuit, San Francisco, California and The Honorable John C. Bowen, United States District Judge for the Western

District of Washington, and The Honorable Edward E. Cushman, United States District Judge for the Western District of Washington, a copy of which order is hereto attached and made a part of this notice.

Dated this 10th day of June, 1937.

VANDERVEER & BASSETT
Attorneys for Complainants

GEORGE F. VANDERVEER
SAMUEL BASSETT

Serv. Accepted
June 12, '37,
E. P. DONNELLY,
Asst. Atty. Gen.

Received for Governor Martin.
By RICHARD HAMILTON
Sec. to the Governor.

June 12, 1937.

Exhibit "2".

ORDER OF JUNE 9, 1937 CONVENING STATUTORY COURT

(Same title as Exhibit "1", and originally annexed thereto.)

It appearing to the Court that Complainants in the above entitled cause have filed a Bill of Complaint alleging that Chapter 218 of the 1937 Laws of the State of Washington, in certain respects, violates provisions of the Constitution of the United States, and

It further appearing that Complainants have moved the Court for a preliminary injunction *pendente lite* restraining the defendants from action pursuant to said provisions of said Act, and

It further appearing that Complainants have moved the Court to convene three judges to hear such application for an interlocutory injunction, and the undersigned judge being duly advised, does hereby call to his assistance to hear and determine the application for an interlocutory injunction in this cause, The Honorable Bert Emory Haney, United States Circuit Judge for the Ninth Circuit, San Francisco, California, and The Honorable John C. Bowen, United States District Judge for the Western District of Washington, the date and place for the convening of the Court for such purpose being hereby fixed as June 29th, 1937 at 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard, in the court room of this court in the Federal Building, at Tacoma, Washington.

The Clerk is directed to forthwith mail a copy of this Order to Honorable Bert Emory Haney, United States Circuit Judge, San Francisco, California and Honorable John C. Bowen, United States District Judge, Seattle, Washington and is further directed to mail copies hereof to

Honorable Clarence D. Martin, Governor of the State of Washington and G. W. Hamilton, Attorney General of the State of Washington, at Olympia, Washington and to the attorneys for complainants, and make return of such mailing.

IT IS FURTHER ORDERED that the Complainants forthwith deliver to the Honorable Clarence D. Martin, Governor of the State of Washington and each of the defendants copy of this Order and, if such has not already been done, a copy of their Bill of Complaint and Motion for injunction with supporting affidavits filed herein.

IT IS FURTHER ORDERED that any affidavits in opposition to the granting of said Motion be by the defendants served and filed on or before June 25th, 1937, and that reply affidavits upon Complainants' part, if any, be served on the defendant Attorney General and filed before noon on Monday, June 28th, 1937.

Signed at Tacoma, Washington, this 9th day of June, 1937.

EDWARD E. CUSHMAN,
Judge.

Exhibit "3".

AFFIDAVIT OF SERVICE OF NOTICE, ORDER, COMPLAINT AND MOVING PAPERS ON GOVERNOR ON JUNE 12, 1937.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1938

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, *et al.*,
Appellants,

vs.

PHIL H. GALLAGHER, Individually and as State Treasurer of the State of Washington, *et al.*,
Appellees.

STATE OF WASHINGTON
COUNTY OF KING } ss.:

Before me, the undersigned authority, personally appeared H. W. Haugland, who being duly sworn deposes and says: that he is over the age of 21 years, competent to be a witness in the above entitled action, and not a party thereto, and in no wise interested therein.

That on the 12th day of June, 1937, he received a copy of the original Bill of Complaint and of the original Order, Motion and Affidavit for Temporary Injunction in Cause No. 606, in the United States District Court, Western District of Washington, Southern Division, together with Notice of Hearing of Application for Interlocutory or Temporary Injunction and Order of Judge Edward E. Cushman, dated the 9th day of June, 1937; and that on the 12th day of June, 1937, he served the same upon the Honorable Clarence D. Martin, Governor of the State of Washington, in the following manner:

That affiant appeared at the office of the said Governor in the Capitol Building in Olympia, Washington, at the hour of approximately 11:00 A. M.; that affiant was met in the reception room of the Governor's office by one Richard Hamilton, known to affiant to be an attorney and personal secretary to the Governor; that affiant left the said documents with the said Richard Hamilton, and that the said Richard Hamilton accepted the said papers for the said Clarence D. Martin, and that the said Richard Hamilton placed an acceptance of service upon affiant's copy of Notice, which acceptance stated:

"Received for Governor Martin
By Richard Hamilton, Secretary to
the Governor, June 12, 1937"

Affiant further states that he is informed and believes that the Honorable Clarence D. Martin, Governor, has authorized the said Richard Hamilton to accept service of all process, and that the above is the usual and customary practice of making service upon the Honorable Governor of the State of Washington.

(Sgd.) H. W. HAUGLAND
H. W. HAUGLAND

Subscribed and sworn to before me this 17th day of October, 1938.

(Sgd.) JNO J. O'BRIEN,
Notary Public in and for the State of Washington, residing at Seattle.

(Notarial Seal—
JNO. J. O'BRIEN,
State of Washington
Notary Public,
Commission Expires, Sep. 28, 1939.)

Exhibit "4".

NOTICE OF APPEARANCE FILED JUNE 28, 1937

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, CARL FISCHER, INC., G. SCHIRMER, INC., IRVING BERLIN, INC., DEEMS TAYLOR, OLEY SPEAKS, WILLIAM J. HILL, ANNE PAUL NEVIN, ELLA HERBERT BARTLETT and JANE SOUSA,
Complainants,

vs.

PHIL H. GALLAGHER, as State Treasurer of Washington; CLIFF YELLE, as State Auditor of Washington; ERNEST N. HUTCHINSON, as Secretary of the State of Washington; G. W. HAMILTON, as Attorney General for the State of Washington; B. GRAY WARNER, as District Attorney of King County of Washington; HARRY H. JOHNSTON, as District Attorney of Pierce County of Washington; RALPH E. FOLEY, as District Attorney of Spokane County of Washington; A. W. SWANSON, as District Attorney of Snohomish County of Washington; H. W. COVALT, as District Attorney of Whatcom County of Washington; SMITH TROY, as District Attorney of Thurston County of Washington; PAUL O. MANLEY, as District Attorney of Grays Harbor County of Washington; ROBERT J. WILLIS, as District Attorney of Yakima County of Washington; GLENN L. BEAN, as District Attorney of Walla Walla County of Washington; SAM M. DRIVER, as District Attorney of Chelan County of Washington; "JOHN DOE" and "RICHARD ROE",
Defendants.

In Equity Cause No. 606-E Appearance

To the Clerk of the Above Entitled Court:

You will please enter our appearance as Solicitors and Attorneys for the Defendants in the above entitled cause, and service of all subsequent papers, except writs and process, may be made upon said Defendants, by leaving the same with:

(Signed) G. W. Hamilton
G. W. HAMILTON
Attorney General of the State of Washington

(Signed) E. B. Donnelly
E. B. DONNELLY
Assistant Attorney General of the State of Washington

(Signed) B. Gray Warner
B. GRAY WARNER
District Attorney of King County, Washington

(Signed) Edwin C. Ewing
EDWIN C. EWING
First Assistant District Attorney of King County, Washington

(Signed) Harry H. Johnston
HARRY H. JOHNSTON
District Attorney of Pierce County, Washington

(Signed) Ralph E. Foley
RALPH E. FOLEY
District Attorney of Spokane County, Washington

(Signed) A. W. Swanson
A. W. SWANSON
District Attorney of Snohomish County, Washington

(Signed) H. W. Covalt
H. W. COVALT
District Attorney of Whatcom County, Washington

(Signed) Smith Troy
SMITH TROY
District Attorney of Thurston County, Washington

(Signed) Paul O. Manley
PAUL O. MANLEY
District Attorney of Grays Harbor County, Washington

(Signed) Robert J. Willis
ROBERT J. WILLIS
District Attorney of Yakima County, Washington

(Signed) Glenn L. Bean
GLENN L. BEAN
District Attorney of Walla Walla County, Washington

(Signed) Alfred J. Schweppe
ALFRED J. SCHWEPPE
Seattle, Washington

(Signed) McMicken, Rupp & Schweppe
MCMICKEN, RUPP & SCHWEPPE
Seattle, Washington
Solicitors and Attorneys for the Defendants.

Exhibit "5".

DEFENDANTS' MOTION TO DISMISS FILED IN DISTRICT COURT JUNE 25, 1937

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, CARL FISCHER, INC., G. SCHIRMER, INC., IRVING BERLIN, INC., DEEMS TAYLOR, OLEY SPEAKS, WILLIAM J. HILL, ANNE PAUL NEVIN, ELLA HERBERT BARTLETT and JANE SOUSA, *Complainants*,

vs.

PHIL H. GALLAGHER, as State Treasurer of Washington; CLIFF YELLE, as State Auditor of Washington; ERNEST N. HUTCHINSON, as Secretary of the State of Washington; G. W. HAMILTON, as Attorney General for the State of Washington; B. GRAY WARNER, as District Attorney of King County of Washington; HARRY H. JOHNSTON, as District Attorney of Pierce County of Washington; RALPH E. FOLEY, as District Attorney of Spokane County of Washington; A. W. SWANSON, as District Attorney of Snohomish County of Washington; H. W. COVALT, as District Attorney of Whatcom County of Washington; SMITH TROY, as District Attorney of Thurston County of Washington; PAUL O. MANLEY, as District Attorney of Grays Harbor County of Washington; JOHN D. EVANS, as District Attorney of Yakima County of Washington; GLENN L. BEAN, as District Attorney of Walla Walla County of Washington; SAM M. DRIVER, as District Attorney of Chelan County of Washington; "JOHN DOE" and

In Equity Cause No. 606

MOTION TO DISMISS ON BEHALF OF DEFENDANTS.

Come now the defendants in the above entitled cause, and jointly and severally move this court to dismiss the Bill of Complaint, upon the grounds and for the reasons stated herein, and upon the facts appearing upon the face of said bill and *dehors* said bill, as hereinafter more particularly set forth, to wit:

I.

That this case does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, in that the amount or value of the subject matter in dispute does not exceed the sum of three thousand dollars ($3,000.00), exclusive of interest and costs, and that in this regard, it, among other things, more particularly appears:

1. That the individual complainants are exempt from the operation of the act (Section 3—See Exhibit "E", Bill of Complaint, page 75).

2. That the complainant, American Society of Composers, Authors and Publishers, is "a voluntary, unincorporated, non-profit corporation" (Bill of Complaint, page 19) and will suffer no loss in complying with the act.

3. That complainants cannot aggregate the amounts in controversy in order to secure the requisite jurisdictional amount.

4. That the act (Section 4—Bill of Complaint, page 75) does not require any filing or license fee to be paid by complainants, or any of them.

5. That the act (Section 2—Bill of Complaint, page 74) imposes a criminal penalty for the use of the copyrighted compositions, or any of them, belonging to the complainants, or any of them, without the consent of the owner thereof;

that this provision is itself a restrainer against unauthorized use of copyrighted works, and that hence complainants have adequate protection against any monetary loss in that regard.

6. That the only immediate requirement of the act is that the persons within the class regulated file in the office of the Secretary of State of the State of Washington a list of their copyrighted works, together with a list of prices for their various copyrighted works (Section 2—Bill of Complaint, page 75), without any filing fee being required for so doing.

7. That the act does not attempt to prevent complainants from doing business; and that the Bill fails to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute will involve.

II.

That the court is without jurisdiction, in that no substantial Federal question is presented by the Bill of Complaint.

III.

That there is a misjoinder of parties plaintiff, to wit: that each of said complainants, Carl Fischer, Inc., G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, as shown by Exhibits "A", "B", "C", "D" and "E" attached to the Complaint, have heretofore executed valid assignments of their entire repertoire of copyrights to the American Society of Composers, Authors and Publishers, and do not now have a sufficient interest to be properly joined as parties plaintiff in this action, and that the statute involved expressly exempts complainants, as individuals, from its operation.

IV.

That said Bill of Complaint does not state any matter of equity entitling complainants to the relief prayed for, nor are the facts as stated sufficient to entitle complainants to any relief in equity against these defendants, or any of them, and that in this regard, it, among other things, appears:

1. That the individual complainants have an insufficient interest to entitle them personally to the extraordinary relief by injunction.

2. That no action is maintainable on behalf of American Society of Composers, Authors and Publishers, because the case does not fall within the New York statute giving such associations a right to sue by its president in certain cases.

3. That complainants have a plain, speedy and adequate remedy at law, in that

(a) Complainants can adequately interpose a defense to any criminal proceeding brought under the act (Section 11—Bill of Complaint, page 81), and such right of defense is an adequate remedy at law; and

(b) That complainants can adequately interpose their defense in any injunction suit brought by any prosecutor under Section 9 of the act (Bill of Complaint, page 78), it being specifically provided in Section 10, Bill of Complaint, page 80, that no right of any person shall be affected in the state courts "without full and complete due process of law."

4. That defendants assert that they do not intend to enforce the criminal penalties of the act until the validity of the act is adjudged.

5. That there is no sufficient allegation that complainants have not complied or cannot comply with the statute, or that they have made any attempt to comply.

6. That Section 2 of the Act, Bill of Complaint, page 74, contains an effective prohibition or injunction in complainants' favor, in that any one using any of complainants' copyrights without the consent of the owner, becomes subject to the criminal penalties of the act. (Section 11—Bill of Complaint, page 81); that there is no allegation that complainants' copyrights are being illegally used in Washington, or that the appropriate public officials arbitrarily refused to prosecute such illegal use.

7. That mere unconstitutionality, even assuming it to exist, does not warrant injunctive relief, but that the facts alleged must bring the case within the recognized rules of equity relating to injunctions, and that complainants have not done so.

8. That said statute, in so far as any question now justiciable is concerned, is a valid exercise of the police power of the State of Washington.

WHEREFORE, the defendants and each of them pray that the Bill of Complaint filed in this cause be dismissed, with costs to the defendants.

G. W. HAMILTON
G. W. Hamilton
Attorney General of the State of Washington.

E. W. DONNELLY,
E. W. Donnelly
Assistant Attorney General of the State of Washington

B. GRAY WARNER
B. Gray Warner
District Attorney of King County, Washington

EDWIN C. EWING
Edwin C. Ewing
First Assistant District Attorney of
King County, Washington

HARRY H. JOHNSTON
Harry H. Johnston
District Attorney of Pierce County,
Washington

RALPH E. FOLEY
Ralph E. Foley
District Attorney of Spokane County,
Washington

A. W. SWANSON,
A. W. Swanson
District Attorney of Snohomish County,
Washington

H. W. COVALT
H. W. Covalt
District Attorney of Whatcom County,
Washington

SMITH TROY
Smith Troy
District Attorney of Thurston County,
Washington

PAUL O. MANLEY
Paul O. Manley
District Attorney of Grays Harbor County
Washington

JOHN D. EVANS
John D. Evans
District Attorney of Yakima County,
Washington

GLENN L. BEAN,
Glenn L. Bean
District Attorney of Walla Walla County,
Washington

ALFRED J. SCHWEPPE
Alfred J. Schweppe
Seattle, Washington

McMICKEN, RUPP & SCHWEPPE
McMicken, Rupp & Schweppe
Seattle, Washington
Solicitors and Attorneys for the Defendants

COPY RECEIVED
June 21, 1937

VANDERVEER & BASSETT
Attorneys for Compl

Exhibit "6".

NOTICE UNDER RULE 12 AND ACKNOWLEDGMENT OF SERVICE

(Filed in District Court August 5, 1938)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1938

GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, CARL FISCHER, INC., G. SCHIRMER, INC., IRVING BERLIN, INC., DEEMS TAYLOR, CLEY SPEAKS, WILLIAM J. HILL, ANNE PAUL NEVIN, ELLA HERBERT BARTLETT and JANE SOUSA, *Appellants,*

against

PHIL GALLAGHER, as State Treasurer of Washington, sued herein as "John Doe"; CLIFF YELLE, as State Auditor of Washington; ERNEST N. HUTCHINSON, as Secretary of the State of Washington; G. W. HAMILTON, as Attorney General for the State of Washington; B. GRAY WARNER, as District Attorney of King County of Washington; HARRY H. JOHNSTON, as District Attorney of Pierce County of Washington; RALPH E. FOLEY, as District Attorney of Spokane County of Washington; A. W. SWANSON, as District Attorney of Snohomish County of Washington; H. W. COVALT, as District Attorney of Whatcom County of Washington; SMITH TROY, as District Attorney of Thurston County of Washington; PAUL O. MANLEY, as District Attorney of Grays Harbor County of Washington; JOHN D. EVANS, as District Attorney of Yakima County of Washington; GLENN L. BEAN, as District Attorney of Walla Walla County of Washington; SAM M. DRIVER, as District Attorney of Chelan County of Washington; K. M. O. INC., a corporation; JOHN G. LOCKHART, *Appellees.*

Pursuant to Rule 12, paragraph 2, Rules of the Supreme Court of the United States, you are hereby served with copies of the petition for appeal, order allowing appeal, assignments of error, and statement as to jurisdiction in the above entitled cause.

Your attention is directed to the provisions of Rule 12, paragraph 3, copied in the margin.

[Signed] THOMAS G. HAIGHT
Thomas G. Haight

[Signed] LOUIS D. FROHLICH
Louis D. Frohlich

[Signed] HERMAN FINKELSTEIN
Herman Finkelstein

[Signed] H. W. HAUGLAND
H. W. Haugland
903-905 Arctic Building
Seattle, Washington
Counsel for Appellants.

Service acknowledged this 4 day of August, 1938.

[Signed] ALFRED J. SCHWEPPE
Counsel for Appellees Cliff Yelle, as State Auditor of Washington; Ernest N. Hutchinson, as Secretary of the State of Washington; G. W. Hamilton, as Attorney General for the State of Washington; B. Gray Warner, as District Attorney of King County of Washington; Harry H. Johnston, as District Attorney of Pierce County of Washington; Ralph E. Foley, as District Attorney of Spokane County of Washington; A. W. Swanson, as District Attorney of Snohomish County

of Washington; H. W. Covalt, as District Attorney of Whatcom County of Washington; Smith Troy, as District Attorney of Thurston County of Washington; Paul O. Manley, as District Attorney of Grays Harbor County of Washington; John D. Evans, as District Attorney of Yakima County of Washington; Glenn L. Bean, as District Attorney of Walla Walla County of Washington; Sam M. Driver, as District Attorney of Chelan County of Washington; Phil H. Gallagher, sued herein as "John Doe".

[Signed] C. C. DILL
KENNETH DAVIS
LEO TEATS
by Leo Teats
Counsel for Appellee K. M. O. Inc.

[Signed] CLARK R. BELKNAP
Counsel for Appellee John G. Lockhart.

Rule 12, paragraph 3:

"Within 15 days after such service the appellee may file with the clerk of the court possessed of the record, and serve upon the appellant, a typewritten statement disclosing any matter or ground making against the jurisdiction of this court asserted by the appellant. There may be included in, or filed with, such opposing statement, a motion by appellee to dismiss or affirm. Where such a motion is made, it may be opposed as provided in Rule 7, paragraph 3."

Exhibit "7".

APPELLEES' ANSWER TO APPELLANTS' STATEMENT AS TO JURISDICTION

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1938

GENE BUCK, individually and as President of The American Society of Composers, Authors and Publishers, CARL FISCHER, INC., G. SCHIRMER, INC., IRVING BERLIN, INC., DEEMS TAYLOR, OLEY SPEAKS, WILLIAM J. HILL, ANNE PAUL NEVIN, ELLA HERBERT BARTLETT and JANE SOUSA, *Appellants*,

vs.

PHIL GALLAGHER, as State Treasurer of Washington; CLIFF YELLE, as State Auditor of Washington; ERNEST N. HUTCHINSON, as Secretary of the State of Washington; G. W. HAMILTON, as Attorney General for the State of Washington; B. GRAY WARNER, as District Attorney of King County of Washington; HARRY H. JOHNSTON, as District Attorney of Pierce County of Washington; RALPH E. FOLEY, as District Attorney of Spokane County of Washington; A. W. SWANSON, as District Attorney of Snohomish County of Washington; H. W. COVALT, as District Attorney of Whatcom County of Washington; SMITH TROY, as District Attorney of Thurston County of Washington; PAUL O. MANLEY, as District Attorney of Grays Harbor County of Washington; JOHN D. EVANS, as District Attorney of Yakima County of Washington; GLENN L. BEAN, as District Attorney of Walla Walla County of Washington; SAM M. DRIVER, as District Attorney of Chelan County of Washington; K. M. O. INC., a corporation; JOHN G. LOCKHART, *Appellees.*

A direct appeal to this Court does not lie from the judgment of the District Court dismissing appellants' bill of complaint on the ground of lack of jurisdiction.

The appellants have appealed directly to this court from the decree of dismissal entered on June 28, 1938, in reliance upon the provisions of Section 266 of the Judicial Code, granting a direct appeal to the Supreme Court from an order of a three-judge statutory court granting or denying, after a hearing on the application therefor, an interlocutory order suspending or restraining the enforcement, operation or execution of any statute of a state.

The provisions of Section 266 permitting a direct appeal do not apply to this case. The findings of fact, conclusions of law and decree entered by the three-judge court dismissed the bill of complaint solely on the jurisdictional ground that the appellants have failed to show that the requisite amount was in controversy. The hearings held by the three judges were devoted to arguments on the preliminary question of jurisdiction raised by the appellees' motion to dismiss the bill of complaint. The bill of complaint having been dismissed for lack of jurisdiction, the determination of which was necessarily preliminary to any action of the court upon appellants' application, the three judges never functioned as a statutory three-judge court. The fact that the decree incidentally recites that the interlocutory injunction is denied cannot affect the fact that the sole determination of the case made by the court was upon a jurisdictional ground.

A three-judge court has a purely statutory existence. Its jurisdiction can be invoked only for the specific purpose of passing upon an application for an interlocutory injunction restraining the enforcement of a state statute. The purpose of Section 266 in permitting a direct appeal from the decision of a three-judge court, after a hearing on the application for an interlocutory injunction, is to permit a speedy de-

termination by the court of last resort in the important class of cases involving the validity and enforcement of a state statute.

Stratton v. *St. Louis S. W. Ry.*, 282 U. S. 10, 14.

This court has held that the provisions of Section 266, requiring the presence of a three-judge court, necessarily assume that the District Court has jurisdiction. The preliminary question as to jurisdiction of a three-judge court need not be determined by the three judges, but may be determined by a single district judge.

Ex parte Poresky, 290 U. S. 30, 31, 32.

Where, as in the instant case, either a district judge or the three judges determine, in advance of any determination of the merits of complainant's application for an interlocutory injunction, that the court lacks jurisdiction, and dismiss the bill of complaint for that reason, the three-judge court, even though called, has never functioned for the purpose provided in Section 266, and hence the provisions for a direct appeal have no application.

This court has repeatedly held that when it has been determined, either by a district judge, sitting alone, or by three judges, that the complainant has failed to show grounds sufficient to invoke the jurisdiction of a three-judge court under Section 266, then, even though the three-judge court may have been properly convened, its action is no longer prescribed, and no direct appeal to the Supreme Court lies from the decision denying, for lack of jurisdiction, a hearing before the three-judge court.

Oklahoma Gas & Electric Co. v. *Oklahoma Packing Co.*, 292 U. S. 386;

California Water Service Co. v. *City of Redding*, 58 Sup. Ct. Rep. 865;

Ex parte Buder, 271 U. S. 461;
Gully v. *Interstate Natural Gas Co.*, 292 U. S. 16;
Ex parte Poresky, 290 U. S. 30.

Here, there has been a determination that the appellants' bill of complaint fails to establish jurisdiction in either the three-judge or any other federal court to hear the application for an interlocutory injunction. Under the rule determined by this court in the cases cited above, the court's decision being on a jurisdictional ground, appellants may not take an appeal direct to this court.

The major part of appellants' statement as to jurisdiction is not addressed to the question of the jurisdiction of this court, but is devoted to the merits of the appeal. We reserve our answer to these arguments until the appropriate time after this court has determined whether or not it has jurisdiction of the appeal.

Respectfully submitted,

B. GRAY WARNER
District Attorney of King County, Washington

EDWIN C. EWING
First Assistant District Attorney of King County, Washington

HARRY H. JOHNSTON
District Attorney of Pierce County, Wash.

RALPH E. FOLEY
District Attorney of Spokane County, Wash.

A. W. SWANSON
District Attorney of Snohomish County, Washington

H. W. COVALT
District Attorney of Whatcom County, Wash.

SMITH TROY
District Attorney of Thurston County, Wash.

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District Attorney of Grays Harbor County, Washington

JOHN D. EVANS
District Attorney of Yakima County, Wash.

GLENN L. BEAN
District Attorney of Walla Walla County, Washington

SAM M. DRIVER
District Attorney of Chelan County, Wash.

ALFRED J. SCHEPPE
Seattle, Wash.

McMICKEN RUPP & SCHWEPPE
Seattle, Washington

Solicitors and Attorneys for Appellees.

Exhibit "8".

CITATION ON APPEAL (Filed August 1, 1938)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, CARL FISCHER, INC., G. SCHIRMER, INC., IRVING BERLIN, INC., DEEMS TAYLOR, OLEY SPEAKS, WILLIAM J. HILL, ANNE PAUL NEVIN, ELLA HERBERT BARTLETT and JANE SOUSA, *Complainants,*

vs.

OTTO CASE, as State Treasurer of Washington; CLIFFORD YELLE, as State Auditor; ERNEST N. HUTCHINSON, as Secretary of State; G. W. HAMILTON, as Attorney General; B. GRAY WARNER, as District Attorney of King County; HARRY H. JOHNSTON, as District Attorney of Pierce County; RALPH E. FOLEY, as District Attorney of Spokane County; A. W. SWANSON, as District Attorney of Snohomish County; H. W. COVALT, as District Attorney of Whatcom County; SMITH TROY, as District Attorney of Thurston County; PAUL O. MANLEY, as District Attorney of Grays Harbor County; JOHN D. EVANS, as District Attorney of Yakima County; GLENN L. BEAN, as District Attorney of Walla Walla County; SAM M. DRIVER, as District Attorney of Chelan County; PHIL H. GALLAGHER, as State Treasurer of Washington, sued herein as JOHN DOE, and RICHARD ROE, *Defendants,*

K. M. O. INC., a corporation,
Intervening Defendant,

JOHN G. LOCKHART,
Intervening Defendant.

In Equity No. 606

Citation on Appeal.

United States of America

To Phil H. Gallagher, individually and as State Treasurer of the State of Washington (sued herein as "John Doe") Cliff Yelle, individually and as State Auditor of the State of Washington; Ernest N. Hutchinson, individually and as Secretary of the State of Washington; G. W. Hamilton, individually and as Attorney General for the State of Washington; B. Gray Warner, individually and as District Attorney of King County of Washington; Harry H. Johnston, individually and as District Attorney of Pierce County of Washington; Ralph E. Foley, individually and as District Attorney of Spokane County of Washington; A. W. Swanson, individually and as District Attorney of Snohomish County of Washington; H. W. Covalt, individually and as District Attorney of Whatcom County of Washington; Smith Troy, individually and as District Attorney of Thurston County of Washington; Paul O. Manley, individually and as District Attorney of Grays Harbor County of Washington; John D. Evans, individually and as District Attorney of Yakima County of Washington; Glenn L. Bean, individually and as District Attorney of Walla Walla County of Washington; Sam M. Driver, individually and as District Attorney of Chelan County of Washington; K. M. O. Inc., a corporation, and John G. Lockhart,

Greeting:

You are hereby cited and admonished to appear in the Supreme Court of the United States, City of Washington, District of Columbia, within forty days from the date hereof, pursuant to an order allowing an appeal from the District Court of the United States for the Western District of Washington, Southern Division, from a decree dated

June 28, 1938, denying complainants' motion for an interlocutory injunction and dismissing the Bill of Complaint as not being within the jurisdiction of the above entitled court as a Federal Court, and from an order dated June 28, 1938, denying complainants' application to take additional testimony in the suit wherein you are defendants (K. M. O. Inc., and John G. Lockhart being intervening defendants), and Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers; Carl Fischer, Inc., a corporation; G. Schirmer, Inc., a corporation; Irving Berlin, Inc., a corporation; Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa are complainants, to show cause, if any there be, why the decree and order appealed from should not be corrected, and why speedy justice should not be done in that behalf.

Given under my hand at Tacoma, Washington, in the district above named; this 1st day of Aug., 1938.

EDWARD E. CUSHMAN
United States District Judge.

Exhibit "9".

TRANSCRIPT OF HEARING, FEBRUARY 9, 1938

IN THE

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

RECORD OF PROCEEDINGS:

At a session of a statutory three-judge Court, convened pursuant to Section 266 of the Judicial Code (28 U. S. Code, Sec. 380), held at Seattle, Washington, on the 9th day of February, 1938, the Honorable Bert Emory Haney, Circuit Judge, the Honorable Edward E. Cushman and John C. Bowen, District Judges, sitting en banc, among other proceedings had were the following, truly taken and correctly copied from the Journal Record of said Court, as follows:

GENE BUCK, etc. *et al.*,
Complainants,

vs.

OTTO CASE, as State Treasurer, *et al.*,
Defendants.

Record of Hearing No. 606

Present: The Honorable Bert Emory Haney, Circuit Judge, the Honorable Judges Edward E. Cushman and John C. Bowen, District Judges. Solicitors Clark R. Belknap, *Alfred J. Schweppe* and George F. Vanderveer are present.

The Court, having heretofore taken the above entitled case under advisement, now announces from the bench to such counsel as are present, that it now invites additional briefs on two questions: (a) the value of the right to be measured by the $3,000 limit, and (b) where that value may be found in the record. Any and all of such briefs are to be filed within twenty days from this date. The Clerk is directed to notify all counsel so that if any are not now present they may have opportunity to file such briefs. A memorandum on the requested briefs is filed by the Court at the request of *Mr. Schweppe.*

Exhibit "10".

AFFIDAVIT OF SERVICE OF PAPERS ON APPEAL

Filed August 5, 1938

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON—SOUTHERN DIVISION

GENE BUCK, individually and as President of The American Society of Composers, Authors and Publishers, *et al.*, *Complainants,*

vs.

OTTO CASE, as State Treasurer of Washington, *et al.*, *Defendants,*

K. M. O. INC., a corporation, *Intervening Defendant,*

JOHN G. LOCKHART, *Intervening Defendant.*

In Equity No. 606. Affidavit of Service

STATE OF WASHINGTON
COUNTY OF } ss.:

BEFORE ME, the undersigned authority, personally appeared HERBERT W. HAUGLAND, Counsel for Complainants, who being first duly sworn deposes and says, that he did on the 4th day of August A. D. 1938, serve on: ALFRED J. SCHWEPPE personally in Seattle, Washington, Attorneys for Defendants in the above entitled cause, and upon Leo Teats, personally in Tacoma, Wash., one of the joint Attorneys for

Intervening Defendant, K. M. O. INC., and on Clark R. Belknap personally in Seattle, Wash., Attorney for Intervening Defendant, JOHN G. LOCKHART, in the above entitled cause, copies of the following papers, to-wit:

Petition for Appeal.
Order allowing appeal.
Appeal Bond and approval thereof by Judge.
Assignment of Errors.
Statement as to Jurisdiction.
Statement directing attention of Appellees to the provisions of Paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States.

And

Citation on Appeal.
Praecipe to Clerk.

H. W. HAUGLAND
Counsel for Complainants

Sworn to and subscribed before me this
the 5th day of August, 1938.

JOSEPH A. SWEENEY
Notary Public

(SEAL)

Exhibit "11".

STIPULATION AS TO RECORD ON APPEAL FILED AUGUST 11, 1938.

(Same Title as Ex. "10")

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties hereto that the material portions of the transcript of the proceedings on the motion for interlocutory motion is hereto annexed and marked Schedule "A", and that the annexed Schedule shall be transmitted by the Clerk of this Court to the Clerk of the United States Supreme Court, in full compliance with Item 13 of the praecipe herein.

IT IS FURTHER STIPULATED that in transmitting the transcript of the hearing held on June 28, 1938 (Item 19 of the praecipe), the Clerk of this Court shall delete therefrom the following:

p. 3—from the word "There" on line 2 to the word "morning" on line 3, inclusive;

p. 3—from the word "There" on line 6 to the word "heard" on line 30, inclusive;

p. 3—from the word "I" on line 31 to the word "involved" on line 32, inclusive;

p. 11—all of lines 30 and 31 and the first three words of line 32;

p. 15—lines 8 and 9 and the first two words of line 10;

p. 16—lines 7 and 8 and the first two words of line 9;

p. 17—lines 17 and 18;

and that the transcript as so amended contains the material portions of the hearing held on June 28, 1938.

IT IS FURTHER STIPULATED that the figures "1939" on the next to last line on p. 21 of the bill of complaint shall be changed to read "1940", and that the figures "1939" on the 16th line of par. THIRTY-SIXTH on p. 41 of the bill of complaint shall be changed to read "1940".

IT IS FURTHER STIPULATED that the number "35-a" be inserted at the beginning of the paragraph commencing in the middle of p. 38 of the bill of complaint.

Dated, Seattle, Washington, August 11th, 1938.

H. W. HAUGLAND,
Counsel for Complainants-Appellants

ALFRED J. SCHWEPPE,
McMICKEN, RUPP & SCHWEPPE,
Counsel for Defendants-Appellees

TEATS AND TEATS,
Counsel for Intervening Defendant-Appellee K. M. O., Inc.

CLARK R. BELKNAP,
Counsel for Intervening Defendant-Appellee John G. Lockhart.

(Clerk's Note: For Schedule "A" see Item 13 of Praecipe.)

Exhibit "12".

AFFIDAVIT OF SERVICE OF APPELLANTS' JURISDICTIONAL STATEMENT AND REPLY BRIEF ON ATTORNEY GENERAL.

(Same Title as Ex. "3".)

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

HERMAN FINKELSTEIN, being duly sworn, deposes and says:

That he is one of the counsel for appellants in this case; that on September 21, 1938 he served on G. W. Hamilton, one of the Defendants-Appellees in the above entitled cause, a copy of the following papers, to wit:

Appellants' Statement as to Jurisdiction, and

Appellants' Reply Brief on Question of Jurisdiction,

by depositing a true copy of the same securely enclosed in a post-paid wrapper in a post office box regularly maintained by the United States Government at 1450 Broadway, in the City of New York, State of New York, directed to said G. W. Hamilton, Attorney General, Tacoma, Washington. Such papers were accompanied by a letter addressed to said G. W. Hamilton, of which the following is a true and correct copy:

"September 21, 1938.

Hon. G. W. Hamilton,
Attorney General,
Tacoma, Washington.

Dear Mr. Hamilton: *Re Buck* v. *Gallagher.*

I am sending you a printed copy of Appellants' Statement as to Jurisdiction and Appellants' Reply Brief on Question of Jurisdiction in the above matter, which have already been served on Mr. Schweppe.

These papers are sent for your convenience.

Very truly yours,

HERMAN FINKELSTEIN.

HF:MK
Enclosures (2)"

[signed] HERMAN FINKELSTEIN.

Sworn to before me this 21st day of September, 1938.

BELLE G. BALATOW,
Notary Public, Queens Co.

Exhibit "13".

AFFIDAVIT OF SERVICE OF CITATION ON APPEAL AND OTHER PAPERS ON APPELLEE ATTORNEY GENERAL,

October 15, 1938

(Same Title as Exhibit "3")

STATE OF WASHINGTON }
COUNTY OF KING } ss.:

Before me, the undersigned authority, personally appeared H. W. Haugland, who being duly sworn deposes and says: that he is over the age of 21 years; that on the 15th day of October, 1938, he did serve personally on G. W. Hamilton, one of the defendants-appellees in the above entitled cause, at Attorney General's Office, in the City of Olympia, State of Washington, copies of the following papers, to wit:

Citation on Appeal;
Petition for Appeal;
Order Allowing Appeal;
Assignment of Errors;
Statement Directing Attention of Appellees to the Provisions of Paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States,

by delivering the same to him personally.

Deponent further says that he knew the person served as aforesaid to be the said G. W. Hamilton.

H. W. HAUGLAND

Sworn to before me this 15th day of October, 1938.

JOSEPH A. SWEENEY

[Notarial Seal]

FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 17 1938
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1938

No. 329

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, *et al.*,
Appellants,

vs.

PHIL H. GALLAGHER, Individually and as State Treasurer of the State of Washington, *et al.*

APPELLANTS' BRIEF.

THOMAS G. HAIGHT,
LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
Counsel for Appellants.

APPELLATE LAW PRINTERS, INC., 103 Lafayette Street, N. Y.
160

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Supreme Court of the United States

OCTOBER TERM, 1938

No. 329

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, *et al.*,
Appellants,

vs.

PHIL H. GALLAGHER, Individually and as State Treasurer of the State of Washington, *et al.*

APPELLANTS' BRIEF.

Opinion Below.

The opinion of the three-judge court below (R. 248) is reported as *Buck* v. *Case*, 24 F. Supp. 541 (June 28, 1938).

Jurisdiction.

This Court noted probable jurisdiction on October 10, 1938, and assigned the cause for argument immediately following argument of the appeal in *Gibbs* v. *Buck*, No. 276.

The statement filed under Rule 12 shows that this is an appeal under Sections 266 and 238 of the Judicial Code (U. S. C., Tit. 28, Secs. 380, 345) from a decision of a three-judge court denying appellants' motion for an interlocutory injunction to restrain enforcement of a State Statute and dismissing the bill of complaint for lack of jurisdiction.

Statutes Involved.

The statute of the State of Washington, the validity of which is involved is the Act of March 19, 1937, being Chapter 218, Laws of Washington 1937 (Session Laws, 1937, pp. 1070-1085). A copy of the statute is annexed hereto as an Appendix (p. 39), and will be referred to as the "State Statute". Its provisions are summarized below. This case also involves the Federal Copyright Act, (35 Stat. L. 1075, Tit. 17, U. S. C., as amended), which is printed in Copyright Office Bulletin No. 14. Copies of this Bulletin will be handed to the Court on the argument.

Statement of the Case.

This action was brought by several owners of copyrighted musical compositions in their individual capacities as well as in their joint capacities as members of the American Society of Composers, Authors and Publishers (hereinafter referred to as the "Society") to enjoin enforcement of the State Statute on the ground that such Statute is in conflict with the Federal Constitution and Treaties between the United States and foreign countries (R. 1-32).

The appellant Society is an unincorporated association consisting of 1,000 composer and author members and 123 publisher members (R. 1-2, 14-15). All members of the

Society grant it for limited periods of time the exclusive right to license the public performance for profit of their copyrighted musical compositions (R. 14-15). The Society in turn issues licenses to users on the joint behalf of all its members (R. 15-16). It has for many years granted such licenses to commercial users of music in the State of Washington, of which licenses 528 were valid and subsisting when the State Statute was enacted (R. 18). Typical license agreements are annexed to the complaint as Exhibits "F", "G" and "H" (R. 18-19, 69, 72, 73).

The verified bill of complaint (R. 1), motion for interlocutory injunction (R. 78) and supporting affidavits (R. 79-164) were filed May 28, 1937 (R. 335). Appellees did not file answers, but did file motions to dismiss (R. 184, 221, 240). The motion for interlocutory injunction and the motions to dismiss were heard before Hon. BERT EMORY HANEY, Circuit Judge, and Hon. JOHN C. BOWEN and Hon. EDWARD E. CUSHMAN, District Judges, on June 29, 1937 (R. 241).

Almost a year thereafter, on May 9, 1938, an opinion was filed by Judge CUSHMAN *dismissing the bill of complaint* and denying the interlocutory injunction on the ground "that there is no competent evidence showing that the matter in controversy exceeds, exclusive of interest and costs, $3,000.00" (R. 248, 276). The court held that the affidavits were incompetent as evidence because of the motions to dismiss, and that in any event the affidavits could not be considered because the court would not "be warranted in accepting, without opportunity for cross-examination, the statement of an owner as to the value of his property unless it was a statement against interest" (R. 276).

At the foot of its opinion, the Court made provision for "additional orders or rulings" if desired (R. 276).

Believing that the purpose of this provision was to give appellants an opportunity to present oral proof in support of their averments as to jurisdictional amount, they applied for an order permitting them to give such testimony in open court or by deposition (R. 277-283). As a manifestation of their good faith appellants, pursuant to an order to show cause (R. 284), produced in open court in Tacoma, Washington, three witnesses who journeyed from New York City, and one from Los Angeles, including the president, chairman of the administration committee and a director of the Society to prove the averments in the bill and affidavits, and to give appellees' counsel ample opportunity for cross-examination (R. 286-292, 303).

The learned court below refused to permit those witnesses to testify and thereupon dismissed the bill and denied the interlocutory injunction for failure to show the requisite jurisdictional amount (R. 303-306, 325-6).

After this Court noted probable jurisdiction, the appellee G. W. Hamilton, Attorney General of the State of Washington, moved to dismiss the appeal on the ground that the Governor of the State of Washington and certain state officials who had not been made parties were indispensable parties, and on the further ground that service of the papers on appeal on Alfred J. Schweppe, Esq., as attorney for the Attorney General was not service upon the Attorney General. This motion was granted only to the extent of dismissing the appeal as against certain appellees, who died or resigned, namely Ernest N. Hutchinson, John D. Evans and Sam M. Driver. In all other respects the motion was denied (November 7, 1938, 83 L. Ed. 89).

Summary of Provisions of State Statute.

(CH. 218, WASHINGTON SESSION LAWS, 1937, P. 1070.)

The State Statute directly affects appellants' copyrighted works in the following way:

1. Performance of copyrighted works without the consent of the owner is made unlawful (Sec. 2, R. 61).[1]

2. The combination within or without the State by two or more persons owning copyrights for the purpose of fixing prices for the use of their copyrighted works or for the purpose of collecting copyright royalties, or of issuing blanket licenses in the State for the right to commercially use their separate copyrighted works is unlawful (Sec. 3, R. 61-62).

3. Notwithstanding the provision making it unlawful for two or more persons to combine as aforesaid, such persons may combine if they issue licenses "on rates assessed on a per piece system of usage", provided that rates assessed on such per piece basis be not in excess of those charged by *any* group in any other State (Sec. 3, R. 62).[2]

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[1]This section merely does lip service to the Federal Copyright Law (35 Stat. L. 1075, Title 17, U. S. C., as amended). In the first place, the enforcement of that law is delegated to the Federal Government exclusively under Article I, Section 8, Clause 8 of the Federal Constitution. In the second place, the subsequent provisions of the State Statute authorizing performances of copyrighted works without the consent of the copyright owners, are in direct conflict with the Federal Copyright Act.

[2]It is appellants' contention that this section is a direct interference with their rights as copyright owners to determine the prices and the conditions under which their works may be performed; that it is unworkable and in effect, confiscates their copyrights as well as nullifies existing contracts between the appellant Society and its members, and between said Society and 528 commercial users of music in the State of Washington (R. 4-12, 15-17, 20-30).

4. A single "sale" of the right of public performance for profit *within or without the State*, bars all copyright owners *whether members of a combination or not*, from thereafter restricting the use of their copyrighted works (Sec. 3, R. 62).[3]

5. All copyright owners who combine "*whether for a lawful purpose or otherwise*" must file annually under oath with the Secretary of State of the State of Washington two copies of a complete list of all their coprighted works, "whether musical or dramatic or of any other classification"; stating the date each separate work was copyrighted; the name of the author, the date of any assignment of the work or of any interest therein, the name of the publisher, the name of the present owner, together with the addresses and residences of all parties who have at any time had any interest in such copyrighted work (Sec. 4, R. 62). The alleged purpose of this section is that all users in the State of Washington may know the rights and titles to the copyrighted works claimed by such persons, and to enable such users to avoid using copyrighted compositions (Sec. 5, R. 62-3).[4]

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[3]Since there can be no right to issue licenses unless the licensor has the right to restrict others from using the copyrighted work, this clause bars appellants from issuing licenses in the State of Washington. All the members of the Society, including appellants, have "sold" to the Society the exclusive right to the use of their copyrighted works in public performance for profit until December 31, 1940 (R. 15, Exs. "B", "C", R. 34, 38). Under the State Statute, they are therefore barred from further restricting such performances.

[4]The Copyright Law itself amply safeguards all users against innocent infringement as explained below in Point III of this brief (pp. 27-31).

A very likely reason for the requirement of this list is that it would make it simple for the State of Washington to execute an involuntary assignment to itself, under Section 9 of the Statute, of all of appellants' copyrighted works without going to the necessary expense of examining the copyright entries in the office of the Register of Copyrights in Washington, D. C.

6. These lists must be filed even if the copyright owners affected are not doing business in the State of Washington so long as renditions of their copyrighted works *have been* or are used commercially in Washington whether originating from a point within the State or from without, so long as any rendition thereof may be heard within the State (Sec. 6, R. 63).[5]

7. The production, creation and commercial use of copyrighted music within the State of Washington even though originating from a point without the State, is declared to be affected by the public interest of Washington (Sec. 7, R. 63).

8. Copyright owners who fall within the condemnation of the statute are denied the right to sue in the Federal courts, in that suits for infringement of copyright or threats of such suits are prohibited; the copyrights of offenders are given a fictitious legal *situs* within the State of Washington (Sec. 5, R. 63-4). If such persons issue licenses "either from within or from without the State", they are deemed to be doing business within the State of Washington (Sec. 8, R. 64).

9. Detecting infringements and notifying users of such infringements are referred to in the Statute as "the business of spying upon and the warning of users" (Sec. 8, R. 64). Such conduct on the part of copyright owners "in addition to the presence within the State of such persons, * * * shall be

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[5]All appellants' copyrighted works have been and are now being publicly performed for profit within the State (R. 23, 27-28), and there is no way of preventing performances of their works by means of radio broadcasting from crossing the borders of the State of Washington and being heard within that State (R. 23-4). In fact, the interstate nature of such broadcasts is the very foundation for the Federal Communications Act. *cf. Fisher's Blend Station, Inc.* v. *Tax Commission*, 297 U. S. 650 (1936); *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266 (1933).

conclusive evidence that such combinations and persons, even though non-residents, have accepted the privileges of doing business within this State" (Sec. 8, R. 64).

10. If any agent, attorney, representative or investigator of any such copyright owner uses any privileges available to a citizen of the State of Washington, the copyright owner is deemed to have accepted all the provisions of the Statute; his licensees are deemed aiders and abettors, and he is deemed to have appointed the Secretary of State of the State of Washington as his attorney upon whom process may be served (Sec. 8, R. 64-5).

11. If any attempt is made by such copyright owners to evade or render ineffectual the enforcement of the Statute, injunction proceedings will be commenced against them in the State courts by service upon the Secretary of State, and a receiver will be appointed of all their copyrighted works and property, tangible or intangible, regardless of the **actual** *situs* of their property. The receiver is directed to seize the copyrighted works of all such owners "including all of the rights to suits for infringement and damages in both State and Federal courts, and all choses of action and all sums due on contracts and licenses" (Sec. 9, R. 65-6).[6]

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[6]In other words, if appellants should decide that in view of the cost of complying with the Statute (which cost will exceed $300,000) (R. 22) as contrasted with the relatively small amount secured from the licensing of their works in the State of Washington ($60,000 annually) (R. 21-2), and should prefer to abandon the issuing of licenses and to treat all persons performing their works as infringers: they will be unable to sue for infringement in the Federal Courts because all right to sue for infringement will have been taken over by the receiver appointed in a manner which offends the constitutional provisions of due process and equal protection of the laws.

12. Upon any attempt of such copyright owners to withdraw their copyrighted works from the State, such receiver must compile a list of all their copyrighted works which have been used in the State (which include practically all of their works); and the court must convene a so-called Anti-Monopoly Board, which board must determine and fix a rate that the receiver shall charge for the single and separate public performance for profit of each copyrighted work of such copyright owners "on a per piece system * * * on a basis of so much money per each time a piece of music is played or used in a public performance for profit" (Sec. 9, R. 66).

13. Failure to appear in said court proceedings for a period of one year, results in the escheat and forfeiture to the State of Washington of all their copyrighted works, and the execution of an involuntary assignment of all the legal and equitable titles to all of the copyrighted works to the State of Washington to be filed with the Register of copyrights at Washington, D. C. (Sec. 9, R. 66-7).

14. If appellants (who are all non-residents [R. 3]), should appear in the State courts for the purpose of contesting the validity of the constructive service upon them in the form outlined in the Statute, such special appearance shall "be deemed as a general appearance even though the process may have been insufficient" (Sec. 10, R. 67-8).[7]

15. The penalties against any offending copyright owners, as well as against any of their licensees, agents,

[7]Strangely enough this section has a proviso that it shall not be construed as denying due process of law (Sec. 10, R. 68).

representatives, investigators and attorneys is a fine not exceeding $500 or imprisonment for not more than six months or both (Sec. 11, R. 68).[8]

Specification of Errors.

The court below erred in dismissing the bill of complaint (Assignment 1, R. 328); in denying appellants' motion for interlocutory injunction (Assignments 2, 3, 16, R. 328, 332); in refusing to hold that the allegations of the complaint were sufficient to support its jurisdiction as a Federal Court (Assignments 4, 5, R. 328-9); in denying to appellants an opportunity to present oral testimony to support the allegations of the bill and moving affidavits (Assignments 6, 7, R. 329-30); in refusing to hold that the State Statute is in conflict with the Copyright Clause (Art. 1, Sec. 8, Cl. 8) of the Federal Constitution (Assignments 9, 10, 14, 17, R. 330, 331-2), the Contract Clause (Art. 1, Sec. 10), (Assignments 5(j), R. 329; 10(c), R. 330-1), treaties made pursuant to Article 3, Section 2 which are the supreme law of the land under Article 6 of the Federal Constitution (Assignments 10(f), 14, R. 331-2), the Privileges and Immunities Clause (Art. 4, Sec. 2) (Assignments 14, 17, R. 331-3), the Privileges and Immunities Clause, the Liberty of Contract Clause, and Equal Protection Clause of Section 1 of the Fourteenth Amendment (Assignments 9, R. 330; 10(b), (c), (d), (e), R. 330-1; 11, 13, 14, R. 331-2; 17, R. 332-3).

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[8]The remaining sections of the Statute provide that if any portion of the Act is declared unconstitutional, such holding shall not affect the validity of the balance of the Statute (Sec. 12, R. 68); and that where more than one injunction suit is instituted in different counties, orders may be issued against the defendants in each of the counties, but if there is a receivership and the defendants are the same the actions are to be consolidated in one county (Sec. 13, R. 68).

Summary of Argument.

1. Appellants' bill, which challenged the validity of a statute of the State of Washington upon the ground that it was in conflict with the Federal Constitution in the respects hereinafter mentioned, and its motion for a temporary injunction against the enforcement of the statute and the imposition of the penalties therein provided, were dismissed by the court below upon the ground that the allegations of the bill did not show that the requisite jurisdictional amount of $3,000 was involved. The case was not before the court on final hearing and no answer had been filed. Appellants were not permitted to offer oral evidence to establish the fact that the jurisdictional amount was involved, the court having previously held that it could not consider affidavits directed to that question.

2. The court below erred (a) in holding that the bill did not allege facts showing that the jurisdictional amount was in controversy, and (b) in failing to recognize that the bill alleged facts which made it unnecessary that the amount in controversy exceed $3,000.

The first error is established because the bill shows that the State Statute destroys contracts which the appellants have that produce $60,000 annually; that to attempt to comply with one of the provisions of the State Statute would cost the appellants $350,000 annually; that a failure to comply with the statute and the enforcement of one of the penalties therein provided would cause a loss to the appellants severally of sums ranging from $100,000 to $1,000,000; that a compliance with the statute would cost four individual appellants alone in excess of $25,000 each, and the remaining individual appellants in excess of ~~$5,000~~ 10,000 each.

The second error arises from the failure of the court to recognize that the State Statute deprives appellants of certain rights and privileges of citizens of the United States and the equal protection of the law, and that in such a case the jurisdictional amount of $3,000 is not necessary.

3. The State Statute is invalid because (a) it violates Art. 1, §8, Clause 8 of the Constitution in that it attempts to regulate the rights of owners of copyrights; (b) it deprives appellants of their property without due process of law; (c) it impairs obligations of existing contracts; (d) it deprives appellants of rights and privileges of citizens of the United States and equal protection of the law; (e) it interferes with appellants' liberty of contract in the State of Washington and elsewhere; (f) it interferes with treaties between the United States and foreign countries.

4. Decisions of three other District Courts have enjoined similar statutes and in doing so necessarily held (a) that complaints containing similar allegations did show the necessary jurisdictional amount, (b) that there was grave doubt as to the constitutionality of such statutes, and (c) that the plaintiffs in those cases (appellants in the case at bar) would suffer irreparable injury if interlocutory relief were denied.

POINT I.

The allegations of the bill of complaint show that the amount in controversy exceeds $3,000; no answer was filed but the bill was dismissed on motion. Consequently it was error for the court below to dismiss the bill without affording appellants an opportunity to prove such of the allegations thereof as might be put in issue by an answer.

As previously stated, no answer was filed to the bill of complaint. Appellees moved to dismiss the bill on several grounds, among which was that the bill did not set forth facts showing that the value of the amount in controversy equalled or exceeded $3,000. The bill was dismissed by the court below on that ground and also because "the record" did not show that the value of the matter in controversy, exclusive of interest and costs, exceeded $3,000 (R. 276, 305, 326); and this notwithstanding the Court considered the affidavits *incompetent* as evidence to prove value, and at the same time denied appellants the opportunity to substitute *testimony* to be taken in open court. The dismissal of the bill was apparently based on Equity Rule 29.

Insofar as the dismissal of the bill in the case at bar was based upon the alleged lack of evidence to show that the jurisdictional amount is in controversy and that the allegations of the *bill* in respect to that question are sufficient, the very recent decision of this Court in *Polk Co.* v. *Glover*, decided November 7, 1938 (83 L. Ed. 73) is directly in point. There a Florida statute compelled canners of citrus fruits to emboss upon the container the name of the state in which the fruit was produced, and prohibited use of the name "Florida" for canned fruits or juices produced elsewhere. The complaint alleged that plaintiffs were canners of citrus fruits grown in Florida; that they had no assurance from any enforcement officer that failure to comply with the statute would not result in criminal prosecution or in con-

fiscation of products packed; that the cost of conforming labels on hand to the requirements of the statute would exceed $3,000; that the tins on hand which could not be used lawfully were worth in excess of $3,000; that the refusal of distributors to handle cans embossed in conformity with the statute would result in loss in excess of $3,000; and that enforcement of the statute would inflict immediate and irreparable injury. Answers were filed, and a motion to dismiss made for failure to state facts sufficient to constitute a cause of action. Plaintiffs moved for interlocutory injunction, and defendants filed affidavits in opposition. The District Court granted the motion to dismiss and denied interlocutory relief on the ground that no sufficient facts had been shown by affidavits or otherwise to overcome the legislative finding in the preamble of the statute that its passage was necessitated by a fraudulent practice of labelling fruits grown elsewhere as grown in Florida, thus injuring Florida producers and canners; that the statute was within the scope of the police power; that there was no showing that the cans on hand could not be used for some other purpose, and that there was not sufficient proof that distributors would refuse to handle cans embossed in the manner required by the statute. 22 F. Supp. 575.

In reversing the decree, and remanding the cause this Court said (*per curiam*, 83 L. Ed. at p. 75):

> "We are of the opinion that the District Court erred in dismissing the bill of complaint. Plaintiffs did not submit the case to be decided upon the merits upon the bill, answers and affidavits. Defendants' motion to dismiss, like the demurrer for which it is a substitute (Equity Rule 29) was addressed to the sufficiency of the allegations of the bill. For the purpose of that motion, the facts set forth in the bill stood admitted. For the purpose of that motion, the court was confined to the bill and was not at liberty to consider the affidavits or the other evidence pro-

duced upon the application for an interlocutory injunction. But the findings of the court indicate that that evidence, in part at least, underlay the final decree it entered.

"We think that the facts alleged in the bill were sufficient to entitle the plaintiffs to an opportunity to prove their case, if they could, and that the court should not have undertaken to dispose of the constitutional issues (as to which we intimate no opinion) in advance of that opportunity. The allegations of the bill as to trade conditions and practices, and as to the effect of the required embossing of cans, raise particular questions which can hardly be said to lie within the range of judicial notice. The salutary principle that the essential facts should be determined before passing upon grave constitutional questions is applicable. See Borden's Farm Products Co. v. Baldwin, 293 U. S. 194, 211-213, 79 L. ed. 281, 289, 290, 55 S. Ct. 187, and cases cited. And that determination requires a hearing in due course upon the issues raised by the pleadings."

In the case at bar the complaint alleges that the appellant Society was formed in 1914 for the purpose of licensing to users of music throughout the country the right to publicly perform for profit the works of its members, and has continuously so functioned since that date (R. 13-14); that one of its functions is to detect infringements of the right of public performance for profit of its members and to institute suits for such infringements (R. 14). Prior to the organization of the Society none of the appellants or their predecessors in interest received any compensation for the public performance for profit of their respective copyrighted musical compositions because users of such music throughout the country refused to recognize appellants' rights, and publicly performed for their private profit the musical compositions owned, written and com-

posed by appellants and their predecessors in interest without payment of any royalties (R. 12). Appellants and others similarly situated were unable individually to enforce their exclusive rights in the public performance of these compositions for profit; they lacked the necessary means to employ investigators throughout the country to detect such infringements which were fugitive, fleeting and ephemeral, the users making no record of such performances (R. 12-13); they lacked means of employing lawyers throughout the country to bring suit against such infringers (R. 13). There was no method by which users who were willing to obtain licenses could do so because they required ready access to a great number of musical compositions for performance each evening at a moment's notice (R. 13); it was impossible for the user to get in touch with the individual owners of the particular compositions, many such owners being scattered throughout the world (R. 13).

When appellants *individually* attempted to enforce their rights they were resisted by economically powerful organizations of hotel owners, innkeepers, cabaret and dance hall proprietors and motion picture exhibitors who offered to defend all infringers even though they were not members of the respective associations (R. 13).

These economic conditions made it necessary for a group of America's leading composers, authors and publishers to form the Society in 1914 (R. 13). Groups of users thereafter continued their organized effort to destroy these rights, augmented and fortified by powerful groups of radio broadcasters with the birth of that industry in 1922 (R. 14). The State Statute was enacted as part of a concerted plan on the part of these users to destroy the Society by legislation prohibiting its operations in the several states and nullifying the rights granted to its members under the United States Copyright Act (R. 14, 17).

While attempting to destroy the organization which enables copyright owners to deal *collectively* with users of

music, the latter have uniformly objected to dealing with *individual* copyright owners for the licensing of the public performance for profit of particular copyrighted musical compositions (R. 15-16). They have asserted that such individual licensing would involve a great amount of bookkeeping, clerical hire and expense, all of which is avoided by the Society's system of blanket licensing (R. 16). The purpose of the users (which this Statute attempts to achieve) is to restore the situation existing prior to the organization of the Society in 1914, when it was impossible as a practical matter to secure protection of the right of public performance for profit against unauthorized uses and wilful piracy (R. 17, 25).

The 123 publisher members, and 1000 writer and composer members of the Society have all entered into contracts with the Society which do not expire until December 31, 1940, these contracts being renewals of previous agreements for five-year terms (R. 14-15). By these contracts all members assign to the Society the exclusive right of public performance for profit in their respective copyrighted musical compositions for the duration of the contracts (R. 15). All contracts are identical, typical ones being annexed to the complaint as Exhibits "B" and "C" (R. 34, 38). The Society also has mutual working arrangements with similar foreign societies having 44,000 members in almost every civilized country of the world, whereby each society is granted the exclusive right to license in its own territory the works copyrighted by the respective members of foreign societies (R. 19-20). Such reciprocal agreements are made possible by copyright treaties between the United States and the respective foreign countries, and by the provisions of Section 8 of the Copyright Act as well as by Presidential proclamations (Tit. 17, U. S. C.) (R. 19).

The Society, in turn, on the joint behalf of all its members and on behalf of the respective foreign societies, licenses users under a form of blanket license which permits the licensee to play any and all compositions of all members

of the Society as well as compositions owned by members of the foreign societies, at any time without the necessity of securing a separate license in advance for each number performed (R. 18-19; Exs. "F", "G" and "H", R. 69, 72, 73).

(a) The complaint shows that joint rights of appellants which are destroyed by the State Statute have a value far in excess of $3,000, and that the cost of attempting to comply with the statute in issuing licenses jointly will be far in excess of $3,000.

This action is brought on behalf of all members of appellant Society (an unincorporated association) to redress an injury to property rights in which all such members have a joint and common interest (R. 1-2, 14-16; Exs. "B", "C" and "D", R. 34, 38, 41).[9]

The matter in controversy between the appellant Society and the appellees exceeds the value of $3,000 as shown by the following allegations of the bill:

(1) The Statute interferes with and destroys 528 contracts between the Society and users in Washington, from whom the Society, on behalf of all its members jointly, has received and would continue to receive annually, but for the Statute, in excess of $60,000, which sum has been lost to it (R. 18-22; Exs. "F", "G" and "H", R. 69, 72, 73). The Society has not received any payments since the effective date of the Statute—a period of more than one year (R. 23-4, 27-30).

(2) It would cost the Society in excess of $300,000 to compile a list containing the information required by the Statute as to the copyrights of its own members, and interests therein, and an additional $50,000 as to the copy-

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[9] Equity Rules 37, 38; Rule 23 of Federal Rules of Civil Procedure; *Smith* v. *Swormstedt*, 16 How. 288, 302-3; *Beatty* v. *Kurtz*, 2 Pet. 566, 584-5; *Local Union No. 497* v. *Joplin Ry. Co.*, 287 Fed. 473, 475 (C. C. A. 8); *Buck* v. *Elm Lodge*, 83 F. (2d) 201 (C. C. A. 2).

rights of members of foreign societies, whose copyrights the Society licenses under reciprocal contracts (R. 20-22).[10]

The amount in controversy is determined by the *joint* interest of all members of the Society since the rights affected by the Statute are joint. In other words, a minimum injury of $60,000 annually to their joint interests is involved if appellants *fail* to comply with the Statute (R. 18-22); and a minimum cost of $350,000 is involved which appellants must spend *jointly* if they attempt to comply with the Statute (R. 20-22). Since appellants' interest in copyrighted compositions of which the exclusive performing rights have been assigned to the Society (and which the Society in turn has the right to license and has licensed to others on behalf of all its members) is common and undivided, it is enough that their interests *collectively* equal the jurisdictional amount. *Troy Bank* v. *Whitehead & Co.*, 222 U. S. 39, 40; *Local Union No. 497* v. *Joplin Ry. Co.*, 287 Fed. 473, 475 (C. C. A. 8); *Haynes* v. *Fraternal Aid Union*, 34 F. (2d) 305, 308 (D. C. Kans.); See also *Shields* v. *Thomas*, 17 How. 3, 4. The value of these contracts is the amount involved. *Texas & Pac. Ry.* v. *Gentry*, 163 U. S. 353, 361.

The court below held that under the doctrine of *KVOS Inc.* v. *Associated Press*, 299 U. S. 269, the court could not

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[10]In addition to the allegations of the complaint, the affidavits submitted in support of the motion for interlocutory injunction show: (1) If the Society fails to comply with the Statute, all its contracts and interests in copyrights throughout the United States will be seized and escheated and forfeited to the State of Washington. It will lose $3,200,000 as its annual license fees from radio broadcasting stations alone (R. 108). (2) It would cost the Society annually in excess of $3,000,000 to attempt to conform its operations throughout the United States to the requirements of the State Statute—an undertaking so prohibitive as to either force the Society to disband or to make license fees so absolutely exorbitant as to make it impossible for the establishment to operate (R. 117). Unless the Society changes its operations outside the State of Washington to conform with the Statute's requirements, it will obviously be guilty of violating the Statute.

consider the *joint* claims of the members of the Society in determining the jurisdictional amount (R. 273-4). The *KVOS* case, however, bears no analogy to the case at bar. There, the Associated Press, a *corporation,* brought an action to restrain a radio broadcasting station from appropriating news gathered by the Associated Press or its members. The members of the Associated Press were owners of newspapers who divided among themselves the cost of the corporation's operations. The injury complained of, was one suffered by three stockholders of the plaintiff who operated newspapers in the vicinity of defendant's station. *Those three members were not parties to the suit.* The means used by Station KVOS consisted in procuring copies of papers published by those three members and broadcasting certain items published therein, whether the news was gathered by the staff of the three papers or received by them from the Associated Press. The complaint was attacked on the ground of non-joinder of parties plaintiff, since the owners of the three papers involved were not made parties, and on the ground that the jurisdictional amount of $3,000. was not involved. The complaint failed to allege the amount received by plaintiff from the three newspapers located in the area reached by the defendant radio station, nor was there any allegation of the jurisdictional amount involved other than the general allegation that the damage to which plaintiff is being subjected is in excess of $3,000, and that the cost of plaintiff's transactions annually, amounting to many millions of dollars was equitably divided among its members. The Court held that there was no sufficient averment of any injury to the plaintiff in excess of $3,000.

There was an allegation that the payments made by newspapers for the news sold to them by plaintiff in the territory served by Station KVOS was upwards of $8,000 per month which was being imperilled by the defendant's

acts, but there was no averment that the members in that territory threatened to withdraw from the plaintiff, or that such members or the plaintiff were injured in any particular sum. Obviously, if the members did not withdraw, there would be no diminution of dues, and the Associated Press would not suffer financially. Moreover, it appeared from the complaint that the plaintiff could not possibly be injured by the defendant's acts, inasmuch as it acted only as a conduit for the clearance of news between all its members. The cost of plaintiff's operation was prorated equitably among its members. The plaintiff did not sell anything or receive anything. Its only transactions were with its members, and the injury to any of the newspapers owned by its members was an injury to such members and not to the plaintiff.

The appellant Society, on the other hand, on the *joint* behalf of *all* its members owns outright the performing rights in musical compositions (Exhibits "B" and "C", R. 34, 38). It licenses these rights and collects moneys therefor. These moneys, as well as the rights belong to the members jointly. Some of these moneys are never distributed but are set aside in a reserve fund (Articles of Association, Ex. "D", R. 41, 58); other moneys are set aside in a relief fund (Ex. "D", R. 58). In short, the Society on behalf of its members has a definite property right which has been injured by the enactment of the Statute.

In the *KVOS* case, this Court said at page 277:

> "The bill seeks redress for damage to the respondent's business and for damage to the business of some or all of its members. The right for which the suit seeks protection is, therefore, the right to conduct those enterprises free of the alleged unlawful interference by the petitioner. *No facts are pleaded which tend to show the value of that right.*" (Italics ours.)

Referring to the allegation that the newspapers in the territory involved in the *KVOS* case paid upwards of $8,000 per month to the Associated Press and that that payment was "being imperilled and jeopardized"; this Court said at page 278:

> "This deposition must be read in connection with the statement in the bill that the respondent makes no profit from furnishing news to its members but equitably divides the expense amongst them. The association cannot therefore lose the $8,000 in question. If the three newspapers in the affected territory cease to pay the sum, they will save it, not lose it, and as to any other damage they may suffer from petitioner's competition, the affiant is silent. Assuming, without deciding, that in the circumstances disclosed the respondent has standing to maintain a suit to redress or prevent damage *caused its members* by petitioner's conduct, the allegation of possible damage to them is wholly inadequate, because *the asserted danger of loss of members is a mere conclusion unsupported by even a suggestion that withdrawal has been threatened by any newspaper, and no intimation is given of the character or extent of the damage they would suffer by such withdrawal.* The respondent having failed to support the allegations as to amount in controversy the District Court should have dismissed the bill." (Italics ours.)

In the case at bar, the injury to the collective rights of appellants is undisputed, certain and inevitable. The Society *must* abandon all its contracts with licensees in the State of Washington because it cannot operate lawfully under the Statute unless it issues licenses on a *per piece* basis. The present licenses are *blanket* licenses. Such licenses give all licensees the right to publicly perform for profit any and all of the works of all the members of the Society and the members of the foreign societies affiliated

with the Society without allocating the payments for each use of each work. Under the State Statute a price would have to be fixed for each use of each work, and separate accountings would have to be made to each member therefor. The continuance of the present blanket contracts is not only impossible but is expressly made unlawful.

The allegations as to the value of the right to be protected and the right to be free of the regulations by the Statute, as well as the losses which must follow the enforcement of the rules prescribed by the Statute are clear, explicit and definite.

Quite irrespective of the damage which the State Statute will cause the Society, as the representative of all of the members jointly, it will be recalled that ten individuals are parties plaintiff and the bill alleges that the State Statute will cause each of these individuals damage in excess of $3,000, the amount of damage being given in each individual case as will be presently shown.

(b) The matter in controversy between each individual appellant and appellees exceeds the value of $3,000 as shown by the following:

(1) They will lose the amounts which they now receive from the Society, since the Statute compels them to surrender their membership. The contracts of each do not expire until December 31, 1940. On the basis of past annual receipts in excess of $50,000 each (R. 29), appellants Carl Fischer, Inc., G. Schirmer, Inc., and Irving Berlin, Inc., will each suffer a net loss in excess of $200,000. Appellants Buck, Nevin, Taylor, Speaks, Hill, Sousa and Bartlett will each lose in excess of $12,000, each having received in excess of $5,000 annually in the past (R. 29).

(2) Compliance with the requirements of the Statute would cost each of appellants, Carl Fischer, Inc., G.

Schirmer, Inc., and Irving Berlin, Inc., annually in excess of $25,000 for investigators, lawyers, clerical help and other expenses in attempting to file the requisite lists (R. 7-8); and it would cost the other individual appellants in excess of $10,000 each to do so (R. 17).

(3) If appellants fail to comply with the Statute, each of them will suffer the forfeiture of all copyrights and interest therein to the State of Washington in a suit wherein process will be served on a fictitious "agent", based on fictitious definitions of "doing business" and of "situs" of copyrights. The value of copyrights owned by appellants Carl Fischer, Inc., G. Schirmer, Inc., and Irving Berlin, Inc., is in excess of $1,000,000 each (Compl., par. 8, R. 7-8). Each of the other appellants has interests in copyrights including renewal rights valued in excess of $100,000, all of which will be confiscated (Compl., pars. 11, 12, 13 and 14, R. 9-12). In addition they will be fined not exceeding $500 and/or imprisoned not more than six months for each offense resulting in penalties of $250,000 against each appellant who attempts to assert his constitutional rights against the 528 users in Washington.

The individual appellants have neither the resources, funds, organization nor ability to protect their copyrighted musical works against infringement and if they are deprived of the right to combine, they will have to surrender and forfeit the right of public performance for profit which is given to them under their respective copyrights (Compl., par. 21, R. 16-17).

It seems clear that facts showing the necessary jurisdictional amount are amply alleged as to each appellant individually, as well as jointly in his capacity as a member of the Society. In any event it is sufficient if the necessary jurisdictional amount be shown as to any one appellant. (*Grosjean* v. *American Press Co.*, 297 U. S. 233, 241-2.)

POINT II.

The allegations of the bill show that by the State Statute, the appellants are denied the equal protection of the laws and are deprived of the privileges and rights conferred upon citizens of the United States; thus the court below had jurisdiction of the cause regardless of the amount involved.

Where a claim is made that a citizen is being deprived of certain rights and privileges of citizens of the United States or that he is denied equal protection of the laws, the Federal Courts have jurisdiction regardless of the value of the matter in controversy. (Jud. Code, Sec. 24, subd. 14 [U. S. C. Tit. 28, Sec. 41]; *Raich* v. *Truax*, 219 Fed. 273, 283, aff'd. 239 U. S. 33 [1915].)

All the individual appellants are citizens of the United States and all reside in the State of New York, except Mrs. Ethelbert Nevin who resides in the State of Maine (R. 3).

The complaint alleges that the State Statute deprives appellants of certain rights, privileges and immunities secured to them by the Constitution and Laws of the United States, to wit, the right to have and enjoy the exclusive rights under certain copyrights granted to them respectively under Article 1, Section 8 of the Constitution of the United States and the Copyright Act of 1909, as amended (35 Stat. L. 1075; U. S. Code, Tit. 17), and the right to exercise these rights freely in the State of Washington, and denies to them in the exercise of these rights the equal protection of the laws; that the State Statute grants special privileges to users of copyrighted music in the State of Washington at the expense and in disregard of appellants' rights; and that it takes their property without just compensation for a private purpose (R. 4-7).

The Statute on its face deprives appellants of the right to act collectively. Yet the individual appellants have neither the resources, funds, organization or ability to protect their respective copyrighted musical works against infringement by unauthorized public performances for profit within the State of Washington, and do not have the means of setting up an agency in the State of Washington such as this Statute would require if they were to attempt to exercise their rights individually in that State (R. 16-17).

The Statute on its face prohibits appellants from exercising any privileges of citizens of the State of Washington, including the right to use the public highways, except at the expense of sacrificing certain interests in their respective copyrights, and it denies them the right to license public performances outside of the State of Washington by means of radio broadcasting, except at the expense of a loss of their rights within the State of Washington and ultimately a confiscation of all their copyrights if any performance of their copyrighted works has been or may be heard within the State of Washington, having been broadcast from stations without the State.

The penalties imposed on appellants by the Statute result in denying them equal protection of the laws by depriving them of the right of free ingress into the State of Washington and egress therefrom, as well as the right to sue for infringement of copyright in the Federal courts. (*Paul* v. *Virginia*, 8 Wall. 168, 180; *Terral* v. *Burke Construction Co.*, 257 U. S. 529, 532; *Harrison* v. *St. L. & San Francisco R. R.*, 232 U. S. 318, 328.)

In singling out for the condemnation of the Statute, one class of owners of intellectual property (namely owners of copyrighted musical compositions) and exempting all others engaged in exactly the same business the Statute denies equal protection of the laws. (*Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 562.)

The sole object of the Statute is to oppress and discriminate against these appellants in favor of their 528 licensees in the State of Washington. This is a proper subject of judicial inquiry. It results in denying equal protection. (*Dobbins* v. *Los Angeles*, 195 U. S. 223, 240; *McFarland* v. *American Sugar Co.*, 241 U. S. 79, 86.)

POINT III.

The Statute on its face is a clear violation of Article I, Section 8, Clause 8 of the Constitution of the United States.

Article I, Section 8, Clause 8 of the Constitution provides that:

> "The Congress shall have power: * * * To promote the progress of science and useful arts, by securing for limited times to authors and inventors, the *exclusive right* to their respective writings and discoveries."

Congress has defined such exclusive rights by granting to the owner of a copyright in a musical composition the exclusive right:

> "(a) To print, reprint, publish, copy and vend the copyrighted work * * *
>
> "(e) To perform the copyrighted work publicly for profit if it be a musical composition and * * * to make * * * any form of record in which the thought of an author may be recorded and from which it may be read or reproduced * * *" (Act of Mar. 4, 1909, 17 U. S. C., §1).

Appellants, upon securing their respective copyrights were granted *exclusive* rights which even the United States may not invade. (*United States* v. *Dubilier Condenser Corp.*, 289 U. S. 178, 186, 189; *James* v. *Campbell*, 104 U. S. 356, 358; *United States* v. *Bell Telephone Co.*, 167 U. S. 224, 249-50.)

A fortiori, the State of Washington may not invade these exclusive rights in the manner attempted by the State Statute.

Moreover, Congress has completely covered by legislation the field of copyright and asserted its authority thereover. Consequently, the several states have lost any right that they may have had to legislate in that field. This proposition is so well settled as to need no citation of authority. However, some of the cases of this court are collected in a footnote.[11] Thus the attempt by the State of Washington, through the State Statute, to invade the copyright field and regulate, directly or indirectly, the rights of copyright owners, is nugatory and the statute invalid.

A copyright owner can rely only on the laws of the United States for his remedies. *Globe Newspaper Co.* v. *Walker*, 210 U. S. 356, 367 (1908). All rights granted by Congress are exclusive. *Lithograph Co.* v. *Sarony*, 111 U. S. 53, 56, 59 (1884); *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284, 291 (1907); *Caliga* v. *Inter Ocean Newspaper Co.*, 215 U. S. 182, 188 (1909).

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[11]Congress has enacted a thorough system of recordation, registration and notice with respect to copyrights as shown in footnote "12". It has also defined the rights granted by a copyright in a manner at variance with the State Statute. In other fields similar acts of Congress have been held to bar state legislation on the same subject. *United States* v. *Hill*, 248 U. S. 420; *Jennings* v. *U. S. Fidelity & Guaranty Co.*, 299 U. S. 216; *Napier* v. *Atlantic Coast Line Ry. Co.*, 272 U. S. 605; *Gilvary* v. *Cuyahoga Valley R. Co.*, 292 U. S. 57. The State Statute purports to define and regulate radio broadcasting in the "public interest". But this Court has already held that that field has been covered by Congress. *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 283.

Among the exclusive rights granted to copyright owners is the right of public performances for profit which includes performances by live musicians in hotels, restaurants and night clubs (*Herbert* v. *Shanley*, 242 U. S. 591), performances by means of radio broadcasting or re-broadcasting (*Buck* v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191), and by means of a radio receiving set installed in each room of a hotel operated from a master-controlled set (*Society of European S. A. and C., Inc.* v. *New York Statler Hotel, Inc.*, 19 F. Supp 1 [1937, S. D. N. Y.]).

The State Statute deprives copyright owners of the right to license the re-broadcasting of their works as well as the public performance of their works by means of radio receiving sets, thus setting at naught rights granted by the Congress under the Federal Copyright Law and Federal Constitution.

This is accomplished by the last proviso of Section 3 of the Statute which prevents copyright owners from restricting the use of their works after a license for a public performance has once been given within or without the State.

It is well settled, that copyright owners cannot be compelled to grant licenses except upon their own terms and at prices fixed by such owners (*F. A. D. Andrea, Inc.* v. *Radio Corp. of America*, 88 F. (2d) 474 (C. C. A. 3), aff'g 14 F. Supp. 226 cert. den. 300 U. S. 681; *Buck* v. *Hillsgrove Country Club, Inc.*, 17 F. Supp. 643 [D. C. R. I.]).

The several States may not pass laws to the contrary (*Henry Bill Pub. Co.* v. *Smythe*, 27 Fed. 914, 917 [S. D. Ohio].)

The State Statute ignores the very foundations of the Copyright Law by requiring the following:

(a) Requiring licenses to be issued on a so-called "per piece system of usage" (Sec. 3);

(b) Loss of the right to restrict the use of their copyrighted works after the right to a single use has been sold (Sec. 3);

(c) Filing a list of prices for all appellants' copyrighted works resulting in the granting of involuntary licenses to all users in the State of Washington (Sec. 4);[12]

(d) Compelling appellants to submit to prices fixed by a so-called Anti-Monopoly Board or having all their copyrights confiscated if the prices charged by appellants are greater than those charged in any other State by any group of copyright owners (Secs. 3 and 9);

(e) Compelling appellants to refrain from notifying infringers of their disregard of the Copyright Act, threatening to sue and suing for infringement in the Federal courts (Sec. 7);

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[12]The provision requiring filing of a list purports to be for the purpose of enabling users of music in Washington to avoid innocent infringement. The Copyright Law (Tit. 17, U. S. C.), however, provides all the safeguards against innocent infringement that Congress has deemed necessary or proper. The Copyright Law provides that every copy of the copyrighted work must bear a *notice of copyright;* that *copies must be deposited* in the Office of the Register of Copyrights; that the copyright notice must state the *name of the proprietor* and the *year in which copyright was secured* (17 U. S. C., Secs. 9, 12, 18). *Assignments* of copyrights must be *recorded* with the Register of Copyrights (17 U. S. C., Secs. 42-46). The *Register of Copyrights keeps a full index* of all copyright registrations and assignments which is printed at periodic intervals, furnished to all parties desiring them at a nominal price (17 U. S. C., Secs. 56, 57). The *Record books* of the copyright office are *open to public inspection.* The State Statute sets up a new system of registration distinct from and in conflict with that set up by Congress.

The information required to be filed has no possible relation to any public interest of the State of Washington and its purpose can only be to harass and annoy appellants and to make it so expensive and impossible to comply with the State Statute as to cause appellants to abandon any attempt to enforce and protect their copyrights in the State of Washington.

(f) Compelling appellants to refrain from employing investigators to detect infringement and from licensing broadcasts in other States except at the risk of having all their copyrights given a *situs* in the State of Washington and being compelled to submit to the jurisdiction of the Washington courts and having their copyrights ultimately escheated to such State (Secs. 8 and 9);

(g) Requiring appellants to waive the right to challenge the jurisdiction of the Washington State courts over their persons (Secs. 8, 9 and 10);

(h) Compelling appellants to surrender all their rights under existing contracts with users in the State of Washington by making it a crime to collect monies due thereunder (Secs. 8, 9 and 11).

Unless appellants are willing to surrender all these rights, they are denied the privilege of enjoying the rights granted to them by the United States under their respective copyrights pursuant to the Constitution and the Acts of Congress thereunder.

POINT IV.

The State Statute on its face clearly deprives appellants of their property without due process of law.

The State Statute so defines the phrase "doing business", as to subject appellants to the jurisdiction of the State courts even though they do not transact any business within the State, do not reside there, and have no agent within the State (Secs. 7 and 8). These fictitious definitions of "doing business" are made the basis of jurisdiction *in personam* of appellants so that the State may confiscate their property and subject them to the penalties and forfeitures

of the Statute by reason of acts over which the State of Washington has no possible jurisdiction as a matter of law. (*Chipman Ltd.* v. *Jeffery Co.*, 251 U. S. 373, 379; *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727; *Minnesota C. M. Assn.* v. *Benn*, 261 U. S. 140, 145; *Old Wayne Life Assn.* v. *McDonough*, 204 U. S. 8; *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79, 87; *Bank of America* v. *Whitney Central Nat. Bank*, 261 U. S. 171; *Caledonian Coal Co.* v. *Baker*, 196 U. S. 432, 444.)

Investigation of copyright infringements within the State is made *conclusive* evidence of "doing business" therein (Sec. 8). This ignores the fact that the *Federal* grant of a copyright is nullified unless the copyright owner is permitted to investigate infringements. It would be just as logical to assert that the transportation of merchandise across the borders of a State by an interstate carrier subjects the latter to the jurisdiction of the State courts as one doing business within the State.

Similar fictions are employed in attributing a Washington *situs* to appellants' copyrights regardless of appellants' domicile and residence if appellants shall in any way violate the Statute, or if their copyrighted works are used or sold for public performance *outside* the State, if intended to be heard within the State from a point outside the State. It is well known that all radio programs from adjoining States, and even from distant States and from Canada, and on short-wave from foreign countries are intended to be heard within the State of Washington.

The excuse for giving such copyrights a Washington *situs* is indeed thin and transparent. It is an attempt to render the enjoyment of a federal right impossible by arbitrarily creating a fictitious legal *situs* incompatible with the existence of the right. (*Harrison* v. *St. Louis & San Francisco R. R.*, 232 U. S. 318, 331.)

The State Statute by creating these arbitrary conclusive presumptions and fictitious definitions, deprives appellants of the right to show that they are not in fact doing business in the State of Washington; that their copyrights actually have no *situs* in the State, and that they have not so acted as to give the courts of Washington any express or implied consent to adjudicate their property rights. In denying appellants a fair opportunity to establish the true facts, the Statute violates due process. (*Manley* v. *Georgia*, 279 U. S. 1, 6; *Heiner* v. *Donnan*, 285 U. S. 312, 328; *Morrison* v. *California*, 291 U. S. 82, 90.)

The indefiniteness of the Statute in view of its drastic penalties, likewise results in denying due process. (*Connally* v. *General Const. Co.*, 269 U. S. 385, 391, 393-5; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 457; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; *A. B. Small Co.* v. *American Sugar Ref. Co.*, 267 U. S. 233.)

POINT V.

The Statute impairs obligations under existing contracts.

The State Statute destroys all of the 528 contracts now existing between the appellant Society (representing all its composer, author and publisher members jointly) and users located in the State of Washington. It imposes the criminal penalties of the Statute upon any licensee who continues to respect the obligations under the existing blanket licenses, as well as upon appellants if they attempt to enforce such contract.

This is accomplished by the provision in Section 8 that "all licensees of any violator of this act shall be deemed as aiders and abettors of said persons and subject to the provisions of this act unless they forthwith indicate their obedi-

ence herewith; and the acceptance of the general privileges of the State of Washington by * * * any aider and abettor as herein defined, and the acceptance by such persons of the rights, police protection, or of any general privilege conferred by the law of this state to any of its citizens, including the use of the roads and highways, or the privileges of any of its political subdivisions, as evidenced by their presence within the state at any time" is deemed equivalent to an appointment by the non-resident copyright owner of the Secretary of State as his agent for service of process against such non-resident growing out of any violation of the Act (R. 64-5).

Appellants' 528 licensees are all located in the State of Washington. All of them obviously are exercising the privileges of citizens of that State since they reside there. Unless those 528 licensees all *forthwith* indicate their obedience to the Statute, that is, unless they forthwith repudiate the blanket licenses heretofore issued to them by appellants, appellants become subject to all the provisions and penalties of the Statute in actions brought in the State Courts on substituted service.

It is for that reason that appellants have been compelled to desist from enforcing their contracts and to cease all activities in the State of Washington since the enactment of this Statute (R. 27-8).

Since such licensees are defined as "aiders" or "abettors", they also come within the penal provisions of the Statute, and if they should continue to discharge their respective obligations to appellants under existing contracts they will each be subjected to a fine of $500 or imprisonment for six months, or both.

The contracts between the Society and users in Washington, and between the Society and its members were valid when made, and cannot now be declared illegal; nor can the obligations thereunder be altered by legislative fiat.

The Constitution of the United States provides (Art. I, §10):

> "No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *."

It is obvious that the purpose of destroying existing contracts is to benefit the other parties to those contracts at appellants' expense. There is no public interest or public necessity involved.

In *Worthen Co.* v. *Kavanaugh*, 295 U. S. 56 (1935), this Court invalidated an Arkansas statute which impaired the security of bondholders under the guise of "public interest". This Court there said at page 62:

> "*What controls our judgment at such times is the underlying reality rather than the form or label.* The changes of remedy now challenged as invalid are to be viewed in combination, with the cumulative significance that each imparts to all. So viewed they are seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security." (Italics ours.)

POINT VI.

The State Statute interferes with treaties between the United States and foreign countries respecting copyrights and with proclamations of the President of the United States recognizing the existence of certain reciprocal conditions between the United States and foreign countries in respect of copyrights.

Section 8 of the Copyright Law (35 Stat. L. 1075) provides as follows as to recognition of copyrights by citizens and subjects of foreign States:

> "(b) When the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection substantially equal to the protection secured to such foreign author under this Act or by treaty; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto.
>
> "The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time, as the purposes of this Act may require."

Pursuant to this provision a number of treaties have been entered into between the United States and foreign countries and there have been 62 Presidential proclamations establishing reciprocity between the United States and foreign countries. (See Copyright Office Bull. #14, pp. 39-54-h.)

Such reciprocity has been established on the basis of copyright laws as enacted by Congress. If each of the States may modify those laws the basis upon which these treaties have been entered into and the proclamations issued will be entirely destroyed.

The Society has reciprocal agreements with similar societies existing in practically every civilized foreign country of the world. These agreements are made pursuant to the treaties and proclamations mentioned above. Since the State Statutes nullifies these contracts it interferes with rights protected by treaties which are the supreme law of the land.

POINT VII.

In all other District Courts in which applications for interlocutory injunction were made to restrain enforcement of similar statutes, such injunctions were granted and the Courts held the allegations of the respective complaints sufficient to confer jurisdiction.

Similar statutes were enacted in Montana on March 12, 1937 (Ch. 90, Laws, Montana, 1937); in Nebraska on May 17, 1937 (Neb. Sess. Laws, 1937, p. 488); in Tennessee, May 21, 1937 (Ch. 212, Laws, Tennessee, 1937); in Florida on June 9, 1937 (1 Gen. Laws, Fla., 1937, p. 204).

Interlocutory injunctions have been entered restraining enforcement of the last three statutes, the complaints in each case containing allegations substantially identical to those at bar. *Buck* v. *Swanson* (Unreported, D. C. Neb., Docket #Eq. 562, *per curiam* opinion by Hons. ARCHIBALD K. GARDNER, C. J., THOMAS C. MUNGER, D. J., and JAMES A. DONOHOE, D. J., Nov. 13, 1937); *Buck* v. *Keaton* (Unreported, Middle Dist. Tenn., Docket #Eq. 728, interlocutory

decree entered by Hons. XENOPHON HICKS, C. J., JOHN J. GORE, D. J., and GEORGE C. TAYLOR, D. J., Dec. 1, 1938); *Buck* v. *Landis* (Unreported, N. D. Fla., Gainesville Div., Docket #Eq. 12, *per curiam* opinion by Hons. RUFUS E. FOSTER, C. J., A. V. LONG, D. J., and LOUIE W. STRUM, D. J., April 5, 1938, appeal pending in this Court, Docket #276).

The decrees in *Buck* v. *Swanson, supra,* and *Buck* v. *Keaton, supra,* were substantially the same as that printed at pages 270-271 of the record in *Gibbs* v. *Buck* (No. 276, October Term, 1938).

A motion for interlocutory injunction to restrain enforcement of the Montana Statute was argued in the Montana District Court before Hons. BERT E. HANEY, C. J., JAMES H. BALDWIN, D. J., and CHARLES N. PRAY, D. J., on April 23, 1937 (*Carl Fischer, Inc.* v. *Shannon*, D. C. Mont., Helena Div. #1537), but no decision has yet been rendered.

Thus, the *three Circuit Judges and six District Judges, who have already passed upon all the questions here involved, have unanimously held with appellants.* The court below refused to pass on the merits. The Montana District Court (Judge HANEY sat in both the Montana Court and the court below) has held its decision in abeyance for the past 20 months.

CONCLUSION.

The order and decree appealed from should be reversed.

Respectfully submitted,

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December, 1938.

APPENDIX.

The Washington State Statute.

Chapter 218, Washington Laws, 1937, page 1070, reads as follows:

AN ACT in aid of the Federal Copyright Laws, to assist in effectuating their true intent and their enforcement in the State of Washington by removing and declaring illegal certain monopolistic abuses and activities wrongfully practiced under the guise of copyrights within the state by price fixing combinations, monopolies, and pools; to enforce the Washington constitutional provisions prohibiting price fixing monopolies and combinations in restraint of commerce and trade; providing penalties for combining rights granted by the copyright laws where the effect of such combination results in the use of copyright privileges as instrumentalities of oppression and extortion within the state in violation of constitutional provisions; and encouraging the rendition, creation and production of copyrighted works among the school children and citizens of the State of Washington; encouraging the marketing and acceptance of copyrighted works, created by the citizens of this state; repealing certain acts; creating a State Anti-Monopoly Board for a particular function to be exercised only in the event of abuses and violations hereof; defining its duties, and the jurisdiction and duties of courts of record, the duties of the prosecuting attorneys, county auditors, the state treasurer and the secretary of state; and providing for the appointment of a receiver in certain instances; defining certain terms; providing for service of process on non-residents, prohibiting certain acts; and providing penalties for violation hereof and repealing section 2690, of Remington's Revised Statutes.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. Section 2690 of Remington's Revised Statutes is hereby repealed.

SEC. 2. It shall be unlawful for any person who, without the consent of the owner thereof, shall cause to be publicly performed for profit any dramatic composition, or dramatic musical composition commonly called an opera, or other copyrighted works, or any substantial part thereof, which has been copyrighted under the laws of the United States, or for any person to knowingly participate in the performance or representation of any substantial part thereof, or by knowingly selling a substantial copy of any substantial part thereof.

SEC. 3. It shall be unlawful for two or more persons holding or claiming separate copyrighted works under the copyright laws of the United States, either within or without the state, to band together, or to pool their interest for the purpose of fixing the prices on the use of said copyrighted works, or to pool their separate interests or to conspire, federate, or join together, for the purpose of collecting fees in this state, or to issue blanket licenses in this state, for the right to commercially use or perform publicly their separate copyrighted works: *Provided, however*, Such persons may join together if they issue licenses on rates assessed on a per piece system of usage: *Provided, further*, This act shall not apply to any one individual author or composer or copyright holder or owner who may demand any price or fee he or she may choose for the right to use or publicly perform his or her individual copyrighted work or works: *Provided, further*, Such per piece system of licensing must not be in excess of any per piece system in operation in other states where any group or persons affected

by this act does business, and all groups and persons affected by this act, are prohibited from discriminating against the citizens of this state by charging higher and more inequitable rates per piece for music licenses in this state than in other states: *Provided, further,* Where the owner, holder, or person having control of any copyrighted work has sold the right to the single use of said copyrighted work, where its sole value is in its use for public performance for profit, and has received any consideration therefor, either within or without the state, then said person or persons shall be deemed to have sold and parted with the right to further restrict the use of said copyrighted work or works.

SEC. 4. In the event two or more persons holding separate copyrighted musical works, or any rights flowing therefrom, whether by assignment, agency agreements, or by any form of agreement, pool their interests, or combine, or conspire, federate, or join together in any way, whether for a lawful purpose or otherwise, a complete list of their copyrighted works or compositions shall be filed once each year in the office of the secretary of state of the State of Washington, together with a list of the prices charged or demanded for their various copyrighted works; no payment or filing fee shall be required by the secretary of state, and said persons, corporations, or association, foreign or domestic, shall state therein under oath, that said list is a complete catalogue of the titles of their claimed compositions, whether musical or dramatic or of any other classification, and in addition to stating the name and title of the copyrighted work it shall recite therein the date each separate work was copyrighted, and the name of the author, the date of its assignment, if any, or the date of the assignment of any interest therein, if any, and the name of the publisher, the name of the present owner, together with the addresses and residences of all parties who have at any

time had any interest in such copyrighted work. The secretary of state shall require two copies of said list, one of which he shall keep on file, the other shall be forwarded to the offices of the state treasurer at Olympia.

SEC. 5. The foregoing list of names and titles, provided for in the preceding section, shall be made available by the secretary of state to all persons for examination, in order that any user of copyrighted works in this state may know the rights and the titles to such copyrighted works as may be claimed by any of said combinations, pools, associations, or persons as aforesaid; said lists shall be prepared so that all persons may avoid using said copyrighted compositions, if they so desire, and may avoid conflict therewith, and avoid committing innocent infringements of said works; and in order to further effectuate the copyright laws of the United States, the secretary of state shall, if he deems it necessary to protect the citizens of this state from committing innocent violations of the copyright laws of the United States, publish such list once each year in a newspaper of general circulation, in order that all citizens of the state may respect any and all individual rights granted by the United States copyright laws.

SEC. 6. No person, corporation, or association, domestic or foreign, whether doing business in this state as hereinafter defined or not, shall be absolved from the foregoing duty of filing said list of holdings as required in the preceding sections of this act, if their music or copyrighted works are used commercially in this state, or have been used herein, whether originating from a point within the state or from without, and as long as any rendition thereof is received or heard within the state, or is intended to be so received by the originator of any musical program: *Provided, however*, Any individual owner of a copyrighted

work or works, not a party to or not connected in any way with any pool, conspiracy, combination, or groups, or association of persons, as prohibited by this act, need not file any such list.

SEC. 7. It is hereby declared that the production and creation of music and the commercial use of music and of copyrighted works within this state, whether originating at a point from within or without the state, as long as the same shall be rendered and publicly received within the confines of this state, whether mechanically or by radio communication, is a business clothed and affected with the public interest, and the adult educational advantages engendered by the public use of music and in its creation, makes this business one of public necessity, and necessary for the education and training of the youth of this state; that many abuses are practiced under a false guise of federal protection which only the state with its police power can easily and lawfully restrain, and in order to prohibit, discourage, and prevent monopolistic practices, and to prevent extortion, to encourage free bargaining between the citizens of this state with each other and with those without the state, and in order to give greater effect to the constitutional provisions relating to monopoly and price-fixing, and in the general interest of the public, therefore, the legislature in the interest of the peace and dignity of the state, in the interest of good morals and the general welfare of the people of this state, and for greater educational advantages to the public, declares that said business shall be subject to the police power and reasonable regulation of the state government, and such police and regulating power shall be administered by the courts and other officials of this state in a manner consistent with, in aid of, and never in conflict with, the copyright laws of the United States. The provisions of this act, and the administration

thereof, shall at all times effectuate the enforcement, the true intent, and meaning of the United States copyright laws in order to prevent abuses from being practiced within this state from points within or from points without the state, by any individual, corporation, or organizations, who attempt to use the federal courts as innocent instrumentalities in the furtherance of any systematic campaign or scheme designed to illegally fix prices for the commercial use of copyrighted works in this state through the use of extortionate means and terrorizing practices based on threats of suits, and an abuse of both state and federal process, all of which are declared to be in violation of this act and of the state constitution; it is further declared that any person or persons, or combines, as aforesaid, who shall violate this act shall be deemed to have used their property within this state in such a way that the same shall have acquired a legal situs, analogous to the situs of other personal tangible property within the state, even though separate from the domicile and residence of the owner: *Provided, further*, The legal situs of any copyrighted work is co-extensive about the state, and a copyrighted work used or sold for public use or public performance for profit, if intended to be heard from a point without the state or from a point within the state, is hereby declared to be a commercial commodity, and its legal situs is hereby declared to be within the State of Washington.

SEC. 8. All persons, groups, corporations, associations, foreign or domestic, violating this chapter, shall be deemed to have been doing business within this state and amenable to the process of the state courts, when any such persons, combinations, or groups shall have issued licenses, either from within or from without the state, for the privilege of using commercially and publicly any copyrighted work or works pooled in a common group or entity, or when any of the functions of said entity, organization, pool, or combine,

is or has been performed in this state; and the business of spying upon and the warning of users of the copyrighted works of such combinations, in addition to the presence within the state of such persons, and the activities of such persons or their agents at any time or occasion for the detection of infringements within this state, shall be conclusive evidence that such combinations and persons, even though non-residents, have accepted the privileges of doing business within this state, and such persons, if they abide by the provisions of this act, shall be granted the privilege of conducting business within this state in a legal manner, and may invoke the benefits of the state government and its political subdivisions in their behalf, and they may use all of the privileges available to the citizens of this state in general, and the use at any time of any general privilege available to any citizen of this state, by any of such agents, their attorneys, or representative, or investigator, or by any aider and abettor, or any non-resident person, group, entity, or combination as aforesaid, shall be deemed to be an acceptance of the provisions of this act; and all licensees of any violator of this act shall be deemed as aiders and abettors of said persons and subject to the provisions of this act unless they forthwith indicate their obedience herewith; and the acceptance of the general privileges of the State of Washington by any non-resident copyright holder or owner, or combination, defendant, or person, or organization of any kind, or entity, through an investigator, attorney, agent, representative, or through any aider and abettor as herein defined, and the acceptance by such persons of the rights, police protection, or of any general privilege conferred by the law of this state to any of its citizens, including the use of the roads and highways, or the privileges of any of its political subdivisions, as evidenced by their presence within the state at any time, shall be deemed equivalent to and construed to be an appointment by such non-resident

or non-residents, as the case may be, of the secretary of state of the State of Washington to be his or their true and lawful attorney upon whom may be served all summons and processes against him or them and growing out of a violation of this act, in which said non-resident may be involved, and said acceptance of the privileges of this state, as aforesaid, shall be a signification of his or their agreement that any summons or process against him or them which is so served shall be of the same legal force and validity as if served on him or them personally within the State of Washington. Service of such summons or process shall be made by leaving a copy thereof with a fee of two dollars ($2) with the secretary of the State of Washington, or in his office, and such service shall be sufficient and valid personal service upon any such non-resident defendant, copyright holder or owner, persons, or defendants, combination, entity, or organization, as aforesaid: *Provided*, That notice of such service and a copy of the summons of process shall be forthwith sent by registered mail requiring personal delivery, by the prosecutor bringing any action under this act, to any defendant at his last known address, and the defendants return receipt and the prosecutor's affidavit of compliance herewith are appended to the process and entered as a part of the return thereof: *Provided, further*, The court in which any action is brought may order such continuances as may be necessary to afford any non-resident defendant or groups or entity, a reasonable opportunity to defend the action: *Provided, further*, The secretary of state shall keep a record of all such summons and process which shall show the day and time of service; and valid personal service shall thus be had on non-resident persons or individuals, entities, firms, or corporations violating this act.

SEC. 9. In the event any person, or groups of persons, or any combination or pool as aforesaid, whether a non-

resident corporation, person, or an association, or domestic, refuse to abide by the provisions hereof, or attempt to evade or render ineffectual the true enforcement of any provision of this act, then the prosecuting attorney of any county where complaint is made of any violation, shall institute injunction proceedings against said persons in the superior court, and valid personal service may be had upon any non-resident defendant as set forth in the preceding section; and the court shall enjoin all persons from violating the provisions of this act and the constitutional provisions prohibiting price fixing, monopolies, and combinations, and all copyrighted works and the public performance rights thereto when sold or used for profit are hereby declared to be a commercial commodity, and all persons, aiders and abettors, and agents, shall be enjoined by the court from aiding or furthering in any way a continuation of any violation of this act, either by the payment of money to said defendants or in any way; and if any defendant or defendants persist in defying the judgment of the court, the court shall, in order to effectuate its judgment and orders, order three (3) days' notice be given said defendant or defendants, as the case may be, by having a copy of such notice served on the secretary of state as heretofore provided if defendants are without the state, or served personally if within the state, and have the same published in some daily paper in the state of general circulation, and at the end of said period, if any defendant or defendants refuse to obey the order of the court, then the court shall appoint the county auditor as receiver for the copyrighted works and property of defendants, tangible or intangible, and of all other effects and monies derived therefrom, and the receiver shall take over and preserve the commercial rights to all of said copyrighted works, together with such other property of any defendant, combination, pool, corporation, or entity through which they are acting, that he can locate within the state,

and the receiver shall administer the same under the direction of the court, and said receivership shall be considered only as an incident to the main injunction suit of the prosecutor, and for the purpose of enforcing the court's orders; the said receiver shall seize the copyrighted works of all of the copyright holders and owners in said defendant combination, including all of the rights to suits for infringement and damages in both state and federal courts, and all choses of action and all sums due on contracts and licenses, and hold the same subject to the order of the court; and all persons holding licenses or contracts with any defendant combination or entity, shall pay the fees and sums due thereon to the receiver for such time as the court may need to effectuate the provisions of this act, and to compel any defendant to abide herewith: *Provided,* Any sums paid on licenses violating this act shall ~~only~~ be continued in the court's discretion or until such time as the court can award defendants complete and full due process of law before entering a final order thereon, or until such time as a legal and equitable system of licensing can be determined according to the subsequent provisions of this act: *Provided further,* In the event any defendant or defendants attempt to withdraw their said copyright works or property from the state in order to violate and render this act or the court's orders ineffectual, or to deprive the citizens of this state of such commodity, or to hamper the enforcement of any provision of this act, or to injure any citizen or user of music in any way, then the court shall immediately order the receiver to compile a complete list of all of the copyrighted works of said defendants which have been used in this state, and the court shall then convene the State Anti-Monopoly Board, as herein now created, consisting of the state treasurer and the state auditor, and said board shall meet in the county where the suit is filed, and the superior judge hearing the cause shall be an advisory member of said board; and

said board, of which the state treasurer shall be chairman, shall have only one function, the discouragement of price-fixing and monopolies, and the court shall then submit to said board the single question of the establishment of license rates for the use of those copyrighted works controlled by the defendants so proceeded against; and for the purpose of aiding in the abolition of monopilies and price-fixing, and preventing violations of this act, the board shall determine a fair and just rate that the receiver should charge for the single and separate public performance for profit of each copyrighted work or works of said defendants, on a per piece system and basis of licensing, and the court shall not be deemed thereby to have divested itself of any of its jurisdiction by so doing; after determining such rate, the said Anti-Monopoly Board shall immediately advise the receiver of its findings, and of its fair rate, and the same shall be filed of record in the cause, and the receiver may then, if said finding is approved by the court, issue licenses for the use of said music at such approved rate on a basis of so much money per each time a piece of music is played or used in a public performance for profit; that said property shall be thus administered by the receiver for a period of one year, or until such time as the defendants, or the individual copyright owners of any combination so proceeded against take oath that they will abide by the ruling of the court and the provisions of this act; and all fees and funds collected by the receiver shall be turned over to the state treasurer, and no receiver's fees or attorney's fees shall be allowed, and the prosecuting attorney shall be attorney for the receiver, and the state treasurer shall keep said money in a separate and special fund, subject to the order of the court only for whatever portion thereof that the court may order used to defray the actual expenses of the board and the receivership; at the end of one year, if the defendants and copyright owners or holders in any combination thus proceeded against, continue

to wilfully disobey the court's orders, then the court shall issue an order, which shall be published in three public places, to the effect that unless the defendants obey all of the orders of the court within ten days from the date of said order, that the court will proceed to permanently deprive said defendants and each of them of their property; and the court shall then order said defendants to show cause within ten days why they should not be involuntarily compelled to assign all of their copyrighted works to the receiver forthwith, and to show cause why all of the funds as collected in the manner aforesaid from licenses, together with all of the copyrighted works including the performing rights thereto of said defendants and members of said combine, should not escheat and be forfeited forever to the State of Washington, and be subject thereafter to administration by the state in the same manner as all other personal property belonging to the State of Washington; if any of said defendants and copyright holders, or owners, do appear before the end of said ten day period, and take oath that they will abide by the future orders of the court and the provisions of this act, then the court shall release their copyrighted works and order the state treasurer to return any and all of their money which has been received or seized: *Provided, however*, The court shall retain such jurisdiction over their persons for such time as the court may deem necessary to insure strict compliance with the terms of the court's judgment and the provisions of this act; if any of said defendants or copyright owners or holders shall ignore or refuse to obey the show cause order, aforesaid, or fail to appear at the end of ten days as ordered and abide by the court's judgment, then the court shall make an order and enter judgment to the effect that all of the copyrighted works, including the performing rights thereto, of said defendants and the members of any defendant combination, shall be construed as having been escheated and forfeited to the State of Washington, and the

court shall thereupon appoint some officer of the court to execute an involuntary assignment of all the legal and equitable titles to all of the copyrighted works of each of said defendants and members of any defendant combination to the receiver, in the event the defendants or any of their members fail to execute a voluntary assignment, and the receiver shall immediately file said involuntary assignment at the United States Copyright Office at Washington, D. C.; and the court shall then order the receiver to close the estate, and turn the titles to said copyrighted works over by proper assignment from the receiver to the state treasurer of the State of Washington, who shall thereafter administer, issue licenses for the use of the same in a manner consistent with this act, and conserve the same as state personal property in his possession, and according to law; and any funds left in the state treasury from said receivership shall escheat and be forfeited to the state and become part of the general fund. *Provided, further*, The state treasurer shall make a report to the legislature on each biennium of the amount of money received from such licensing and the amount of property he has on hand through the enforcement of this act.

SEC. 10. That in the event any person, or any of the defendants, or non-residents, or non-resident copyright owners or holders, are proceeded against as herein outlined, and are served with process according to law, or any non-resident is served with process as outlined in the preceding sections of this act, and if any of said defendants, or persons, or aiders and abettors named as defendants, appear in any such proceeding by counsel or otherwise, or institute any special proceeding attacking such proceeding, or make any motion therein, either special or general, or if any of them appear to obtain the judgment of the court solely upon the sufficiency of the service of the process upon them, or upon any phase or particularity of said injunction proceedings, such

special proceeding or appearance, or motion, or appearance, as the case may be, shall nevertheless be deemed as a general appearance even though the process may have been insufficient, and said parties and defendants as may thus appear in the action, for any reason or cause, whether they seek special or affirmative relief, shall thereafter be subject to the general orders and jurisdiction of the court for all purposes, and if any of said defendants or persons appear in any court proceeding instituted to effectuate this act solely for the purpose of challenging the validity of service of process upon them they shall be deemed to have surrendered themselves and as having submitted to the general jurisdiction of the court: *Provided, however*, This section shall not be construed as denying, and no attempt shall be made at any time in any proceeding in connection with the enforcement of this act, to restrain or deny any of said defendants, resident or nonresident, copyright holders or owners, or any person, or members of any defendant combination, entity, pool, or monopoly of their rights or property without full and complete due process of law.

SEC. 11. Every person, in addition to the other penalties provided in this act, who violates or who procures, or aids or abets in the violating of any provision of this act, or who conspires to render ineffectual any valid order or decision of any court in the enforcement of this act, or who procures, conspires with, or aids or abets any person or persons in his or their failure to obey the provisions of this act, or to render ineffectual any valid order of any court in connection with the enforcement of this act shall be deemed guilty of a gross misdemeanor, and upon conviction, shall be punished by a fine not exceeding five hundred dollars ($500), or imprisonment in the county jail for not more than six months, or both such fine and imprisonment.

SEC. 12. In case any part or portion of this act shall be held unconstitutional, such holding shall not affect the validity of this act as a whole or any other part or portion of this act, and if any clause, sentence, paragraph, subdivision, section or part of this act shall for any reason be adjudged invalid, such judgment shall not affect, impair, or invalidate the remainder of the act, but shall be strictly confined in its operation and holding to the specific clause, sentence, paragraph, subdivision, section, or part thereof, directly involved in the controversy in which such judgment shall have been rendered; and all other acts and laws in conflict herewith are hereby repealed.

SEC. 13. In the event more than one injunction suit provided for in this act is instituted in this state, in different counties by different prosecuting attorneys, but against the same defendants, the respective superior judges hearing the causes may issue orders against said defendants in any county, but in the event any of the various county proceedings enter into the stage of receivership, as herein provided, then the judges hearing the respective causes shall order those causes where the defendants are the same, to be consolidated in one action in one particular county, and in such county as the judges may decide, to the end that only one receiver may be appointed for the entire state for the property of the same defendant or defendants.

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IN THE

Supreme Court of the United States

October Term, 1938.

No. 329.

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, et al.,
Appellants,

v.

PHIL H. GALLAGHER, Individually and as State Treasurer of the State of Washington, et al.

APPELLANTS' REPLY BRIEF.

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Counsel for Appellants.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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APPELLANTS' REPLY BRIEF.

This brief will be directed to two points: (a) whether if this Court reverses the Court below, it should direct the latter to grant a preliminary injunction or merely confine itself to a reversal on the jurisdictional question; and (b) an answer to certain of the contentions in respondents' brief that the bill and affidavits do not establish that the controversy involves more than $3,000.

I. THE COURT SHOULD DIRECT THAT THE INTERLOCUTORY INJUNCTION BE GRANTED.

Appellees' brief contends that this Court should limit itself to the consideration of the jurisdictional question alone. We submit that under the peculiar circumstances of this case, to be presently detailed, the Court should go further and direct that the preliminary injunction issue if it determines that appellants' position on the question of jurisdiction is sound. The question as to whether the preliminary injunction should issue depends, aside from the jurisdictional question, upon whether the State statute is constitutional. This latter question can de determined from the face of the State Statute itself without regard to evidence. The jurisdictional question must, of course, be determined on this appeal.

If a State Statute on its face violates the Federal Constitution, it can hardly be asserted that the question of whether a preliminary injunction against the enforcement thereof should issue is a matter within the judicial discretion of the court to which the application for the injunction is addressed. Certainly a failure to grant an injunction against the enforcement of an unconstitutional statute would be an abuse of discretion. The cases cited in appellees' brief (P. 3) are not applicable to the situation here presented.

In *Bordens Co.* v. *Baldwin*, 293 U. S. 194, 213, the Court specifically said:

> "* * * we do not pass upon the ultimate question of the constitutionality of the statute."

In *Wilshire Oil Co.* v. *United States*, 295 U. S. 100, the case was before the Court on a certificate from a Circuit Court of Appeals. The Court said (P. 103):

> "Nor should this Court undertake to determine the constitutional validity of the statute upon such questions as those which have been certified. If this Court were to deal with the case in its present stage, *it would*

be necessary to order up the entire record, so that the allegations of the bill, and the case as presented to the District Court, could be properly considered. That course would merely bring before this Court the interlocutory order and would *result in unnecessary delay in the final determination of the case.*" (Italics ours)

In *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 347, the Court refrained from passing upon the constitutionality of the statute there involved. We can see no possible pertinency of that case.

In *Alabama* v. *United States*, 279 U. S. 229, the Court was reviewing an order of the Interstate Commerce Commission, establishing interstate rates, and applied the well settled doctrine that the decision of a lower court and board, in granting or denying a preliminary injunction will not be reviewed except for abuse or discretion.

In the case at bar the injunction was not denied in the exercise of discretion but because the Court below considered the allegations of the bill and the supporting affidavits insufficient to establish that the jurisdictional amount was in controversy. We take it, therefore, that there is no reason why this Court should not order the preliminary injunction to be granted if it considers that the Court below had jurisdiction, provided, of course, sufficient compelling circumstances are shown.

Appellants have been compelled since the effective date of the State Statute (June 14, 1937) to forego the collection of all royalties due under their contracts with licensees in the State of Washington although their works are being constantly performed in the State (Offer of Proof, R. 295).

The long delay in disposing of this case was not due to any fault of appellants. They brought this suit to restrain enforcement of the State Statute before the Statute's effective date (suit having been filed and application for injunction having been made on May 28, 1937 (R. 335)). The case was not set down for hearing until June 29, 1937, and decision was not rendered until May 9, 1938.

Because of the court's ruling that there was no competent evidence showing that the matter in controversy exceeded $3,000 (R. 248, 276) and because of provision in the court's opinion for making motions for "additional orders * * * based upon the foregoing ruling" (R. 276), appellants applied for leave to submit additional oral testimony in support of their allegations. An affidavit in support of an application to take additional testimony (R. 277-83) was filed May 17, 1938 (R. 337), and an order to show cause directing a hearing on that application to be held on June 28, 1938, was made on June 2, 1938 (R. 284).

At the hearing held on June 28, 1938, appellants offered to present oral testimony by deposition or by witnesses, who were produced in open court after making the journey to Tacoma, Washington, from New York City and elsewhere. The Court below, however, refused to permit such testimony to be taken (R. 286-303).

Appellants perfected their appeal herein on August 1, 1938 (R. 327) and have pursued their appeal with the greatest diligence. The fact remains, however, that appellants have not been able to enjoy the benefits of their copyrights in the State of Washington for a period of over eighteen months.

Appellants were confronted with a similar situation in the State of Montana, where a statute similar to the State Statute (Laws of Montana, 1937, Ch. 91) was enacted on March 12, 1937. A suit to restrain enforcement of that statute was brought in the United States District Court for the District of Montana, Helena Division, and a motion for interlocutory injunction was heard on April 23, 1937. (*Carl Fischer, Inc.* v. *Shannon*, D. C, Mont No. 1537) Decision in that case was withheld for over twenty months, after which an opinion dismissing the bill of complaint for want of a "showing that the requisite jurisdictional amount is involved" was delivered on December 28, 1938, by the same presiding Judge who presided in the court below in the case at bar, with a dissenting opinion by District Judge Baldwin.

If this Court should be of the opinion that the record shows the jurisdiction of the court below, and should fail to direct the granting of an interlocutory injunction, appellants will be remitted to the court below for action on their application for such injunction. In most probability they will again suffer endless delay before their motion is finally disposed of. Thus, appellants may be denied their constitutional rights in the States of Washington and Montana for such a long period of time as to defeat the ends of justice.

It is submitted that the court below should be directed to grant the interlocutory injunction forthwith, to the end that appellants may not suffer further undue and irreparable injury through a Statute, which, it is submitted, is unconstitutional on its face. *Cf. McCardle* v. *Indianapolis Co.*, 272 U. S. 400, 420; *Davis* v. *Denver Union Water Co.*, 246 U. S. 178, 182.

II. THE BILL AND RECORD AMPLY ESTABLISH JURISDICTION.

Appellees argue that "only the allegations of the complaint, and not accompanying affidavits or testimony, can be considered" (Appellees' br. p. 9), and thereupon proceed to an examination of the bill of complaint ignoring all the supporting facts established by affidavit.

We submit that the bill of complaint *alone* contains a sufficient showing of jurisdiction; secondly, that if there be any doubt about the subject, the *affidavits* conclusively support the allegations of the bill in great detail, and finally, that if any lingering doubt remains after an examination of the bill and affidavits, appellants should have been permitted to offer oral testimony in support of their allegations.

Appellees' present position is inconsistent with the opinion of the court below. The finding that the allegations of the bill are insufficient to show that the value of the matter in controversy exceeds $3,000 (R. 305) must be read in the

light of the statement in the court's opinion, to the effect that

> "if the allegations of the Bill as to jurisdictional facts are by the defendants challenged in an appropriate manner, complainants must support them 'by competent proof', McNutt v. General Motors Acceptance Corp., 298 U. S. 178-189.
>
> "There is no question but that the motion of the defendants to dismiss, denying that the matter in controversy exceeds $3,000.00 exclusive of interest and costs, was sufficient at the hearing had to place upon complainants the burden of so establishing that it is in excess of such amount." (R. 272)

The conclusion of the court that jurisdiction was not shown was not based upon the allegations of the complaint alone but rather upon a theory that when a motion is made to dismiss the complaint for want of jurisdiction, the burden rests upon the plaintiff to establish all the facts relating to jurisdiction, in the same manner as if the case were being tried on the merits. This explains the finding of the court "That the *record* does not show that the value of the matter in controversy, exclusive of interest and costs, exceeds $3,000.00" (R. 305), and the further finding "That the *record* does not show what is the value of the matter in controversy" (R. 306).

We submit that for the purpose of an application for interlocutory injunction and for the purpose of the motion to dismiss the complaint, the jurisdictional facts were amply alleged, and that had the court permitted appellants to offer oral testimony in support of their jurisdictional allegations, the record would contain the same quantum of proof that would be necessary upon a trial after issue joined by answer.

In the case at bar it must be remembered that no answer has been interposed, and that the decision below deprives appellants of any opportunity to prove their case upon the merits in the usual manner. See *Polk Co.* v. *Glover*, 83 L. Ed. 73, 75.

Appellees' brief (page 4) erroneously states that on the June 28, 1938, hearing "complainants' counsel, *without having previously given notice of intention to do so,* asked the court immediately to hear the testimony of three witnesses brought to the hearing."

The fact of the matter is that appellants asked the court to permit these witnesses to testify in any manner that the court saw fit, by deposition in New York or before a Master in Washington or in open court at the very hearing on the return of the motion for leave to submit such testimony (R. 277-284). Since the court, in its opinion, complained that counsel for appellees had been given no opportunity of cross-examination, there was no better way to manifest appellants' good faith than to bring their witnesses to court on the return day of the order to show cause. Had they not done so, they would have been subjected to criticism for failure to offer "competent evidence." Having offered such evidence to show their good faith, after an order to show cause, they are now criticized for not having delayed presentation of oral testimony until *after* the court's ruling on their application.

Insofar as the court dismissed because the *record* does not show the value of the record in controversy, the findings are inconsistent with the opinion of the court and its action on the motion to submit oral testimony. If the court believed that the form of the averments in the record as to jurisdiction was not "*competent,*" and that the facts alleged should have been established by *oral* testimony with an opportunity for cross-examination, the court should have permitted such testimony to be taken. The truth is that oral testimony was wholly unnecessary and that the record in its present form amply sustains the jurisdictional allegations. The court erred in its opinion when it suggested that oral testimony was necessary and it doubly erred when it refused to hear such testimony once it was offered.

Appellees erroneously contend (pp. 13-14) that

> "[1] So far as appears from the complaint, the entire $60,530.68 collected in the State of Washington may have been paid to the 44,000 members of the foreign societies and nothing to the Society's own members. [2] So far as appears from the complaint none of the compositions of which the Society owns the public performing rights has ever been used in the State of Washington. [3] The same impossibility of segregation exists with reference to the allegation of the cost of compiling the information required by the Washington statute, only a single amount being pleaded both for the Society and the 44,000 foreign composers."

These three statements are all incorrect. In the first place, there is nothing in the record to show that any part of the $60,530.68 collected in the State of Washington was paid to the 44,000 members of the foreign societies. The complaint alleges (R. 19-20):

> "Under mutual working arrangements with foreign societies, the Society has the exclusive right to and does license within the United States, the public performance for profit of the musical compositions copyrighted by all the members of said respective foreign societies, and said foreign societies have the exclusive right to, and do license within the territorial limits of their respective countries, the public performance for profit of the musical compositions copyrighted by members of the Society. Under such arrangements between the Society and said foreign societies, the latter are not required to, and never have, filed lists of the respective works copyrighted by their respective members."

It is obvious from this allegation that insofar as this record is concerned, the consideration for the granting of rights in the United States by the foreign societies is a reciprocal grant by members of the American Society under their foreign copyrights to the respective foreign societies. The term "mutual working arrangements" is expressly so explained in paragraph 25 of the complaint. The hypo-

thetical situation which appellees' brief creates cannot by any reasonable stretch of the imagination be inferred from the pleadings.

It is clear that the appellant Society which is before this court will lose all of the $60,530.68 collected annually from copyrights in the State of Washington because the members of the Society cannot rescind their grants to foreign societies merely because of the passage of the State Statute.

The second statement quoted above is likewise erroneous. The statement "that none of the compositions of which the Society owns the public performing rights has ever been used in the State of Washington" is refuted by the following allegations of the complaint:

> "The copyrighted works of the complainants and of all the other members of the Society and of the affiliated societies have at one time or another been publicly performed for profit in the State of Washington, and a great number of the copyrighted works of the complainants are being constantly performed in the State [fol. 32] of Washington, and will continue to be performed in the State of Washington" (R. 23).
>
> "* * * that the programs broadcast by many stations outside of the State of Washington, whether affiliated or not with any station located within the State of Washington are heard within the State of Washington, and such programs include the broadcasting of music copyrighted by the members of the Society, including the complainants herein; broadcasting stations without the State of Washington broadcast daily in excess of 100 copyrighted works of the complainants and other members of the Society and of its affiliated societies, which broadcasts are heard on receiving sets within the State of Washington" (R. 23-4).
>
> "There are thirty-one counties in the State of Washington, in each of which there are establishments publicly performing for profit the copyrighted musical compositions of members of the Society, including the other complainants herein, and the foreign societies with which the Society has reciprocal arrangements" (R. 27-8).

These allegations are supported by the testimony of the operator of two large broadcasting stations in the State of Washington, Bert F. Fisher, whose testimony is as follows: R. 243-4:

> "I am connected with radio stations KOMO and KJR as Secretary of the corporation and General Manager of the stations, which I have been managing since 1925. These stations are on the air approximately seventeen hours each day. *75 per cent of that time is devoted to the broadcasting of copyrighted music and musical compositions,* of various kinds. *In the course of each hour fifteen or more musical compositions or parts of them are broadcast,* on an average.
>
> "*I have no license from any copyright owners other than the American Society of Composers, Authors, and Publishers to broadcast their musical compositions and have never had one to my knowledge.* I do not know what musical compositions are controlled by the American Society of Composers, Authors, and Publishers, or how many there are. *We make no attempt to confine the broadcasting of your musical compositions owned or controlled by that Society. I do not know how many times a day I violate or infringe somebody's copyright.*
>
> "Q. If you had no medium by which to secure—through which to secure blanket privilege of broadcasting musical compositions in large numbers, such as you get from the ASCAP, [abbreviation for appellant Society] would it be practically possible to operate your station, without infringing?
>
> "A. Well, I never know when I am infringing, and I don't know now. *We feel that the only protection we have is the license which we get from ASCAP.*"

At the close of this testimony, there was no cross-examination as appears from the following notation in the record:

> "Mr. Dill: No questions" (R. 234).

The third statement, to the effect that it is impossible to segregate the cost of compiling the music required by the

State Statute as betwen the copyrights owned by the members of the Society and the copyrights owned by the foreign societies is likewise contradicted by the allegations of the bill of complaint. As to the foreign societies, the cost of attempting to compile such a list (where nothing more than an *attempt* can be made because complete compilation is impossible) is alleged to be in excess of $50,000 (R. 20), whereas the cost for filing the list for the Society and affiliated societies is in excess of $300,000.

Although the Society represents 44,000 members of foreign societies, the number of American copyrights owned by members of such foreign societies is quite obviously substantially less than the number of copyrights owned by the 1123 members of the appellant Society. The copyrights owned by members of the Society are primarily American copyrights and the copyrights owned by the members of the foreign societies are primarily foreign copyrights. But members of the Society own *some* foreign copyrights and members of foreign societies own *some* American copyrights. It is for that reason that mutual working arrangements are necessary which permit each society to license in its respective territory the works copyrighted in that territory by members of foreign societies. Because of the far greater number of American copyrights owned by members of the American Society, an attempt to compile the list required by the statute will cost five times as much as to the members of the American Society as it will with respect to members of foreign societies, notwithstanding the additional difficulties entailed in obtaining information from members of foreign societies, all of whom reside abroad.

At page 15, appellees state:

> "There being no method of determining from the allegations of the bill of complaint in this action the value of the right of the Society and its own membership to license public performance of musical copyrights, or of ascertaining of any loss which the Society itself

would suffer in the event the statute would be complied with, the Society has not made the requisite showing of $3,000., exclusive of interest and costs herein."

This conclusion follows from the false premises advanced above. Since the premises are false, the conclusion falls. The complaint quite obviously shows that the Society will lose a sum in excess of $60,000.00 annually which it would receive from users in the State of Washington but for the enactment of the state statute. If the Society attempts to comply with the statute, it will lose at least the $300,000.00 which would be the cost of attempting to compile the information required by the statute. As a matter of fact, however, there would necessarily be a loss of the full $60,000.00 because the present contracts between the Society and users in Washington are outlawed, and secondly, the expenditure of an excess of $300,000.00 to attempt to compile the information required, would be a futile expenditure because the statute requires the furnishing of a "complete" list. It is impossible to furnish a complete list, and the furnishing of a partial list would not be a compliance with the state statute. Hence, an attempt to comply with the statute would merely result in a useless expenditure of more than $300,000.00 and in a loss of more than $60,000.00 which the Society now receives annually from users in Washington.

The third point of appellees' brief is that "the jurisdictional amount as to the individual appellants has not been shown". (p. 20.)

In attempting to support this conclusion, appellees argue that the complaint merely contains conclusions as to the values of the copyrights of the individual appellants ranging from $1,000,000.00 down to $100,000.00 and as to the cost of attempting compliance with the statute, ranging from $25,000.00 down to $10,000.00 as to each appellant and alleges that each appellant received from the Society in 1936 amounts varying as to each from more than $50,000.00

to more than $5,000.00 "for licensing the public performance of their works over the entire world". There is nothing in the bill of complaint from which a conclusion can be inferred that the sums received by each appellant from the Society are for the granting of licenses "over the entire world". *The only conclusion justified from a reading of the complaint is that the amounts received by the individual appellants from the Society are received from a licensing of copyrights in the United States.*

If the individual appellants were compelled to withdraw from the Society (as they must if they wish to comply with the statute and to avoid its penalties) they must forego the entire amount now received from the Society regardless of the source of the revenue. They cannot obtain any compensation separately from the licensing of their work abroad because foreign societies have already been granted the right to license such works. Since appellants will each lose these amounts because of the enactment of the State Statute, that loss will directly result therefrom.

Appellees attempt to escape this inevitable conclusion by stating at page 22 of their brief:

> "We are here dealing with a state statute operative only within the territorial limits of the state, which can damage each of the individual appellants only to the extent that it affects his business done within the state."

And further (pp. 22-3):

> "Nowhere is there an allegation * * * as a matter of fact, that a single piece of music belonging to the individual complainants was ever publicly performed in the State of Washington."

We have already shown that the last statement above quoted is incorrect and that the bill of complaint repeatedly alleges that the musical compositions belonging to appellants have been performed within the State of Washington and are being constantly performed there.

As to the first statement immediately above quoted, the statute itself bristles with contradictions of appellees' conclusion. From beginning to end, the statute operates extra-territorially.

Section 3 condemns combinations "either within or *without the State*"; requires licenses to be issued on a "per piece basis" at no higher rate in the State of Washington *than in other States*, and prevents copyright owners from further restraining the use of their works after selling a license for public performance for profit "either within or *without* the State".

The lists required by Section 4 must be supplied to the Secretary of the State of Washington (under Section 6) even though appellants do no business in the State of Washington so long as performances of their copyright compositions may be *heard* within the State of Washington "whether originating from a point within the State or from *without*".

Section 7 declares that the production and creation of copyrighted music is affected with the public interest of the State of Washington if performances of the work *originating without the State* may be heard within the State; and gives appellants' copyrights a fictitious situs within the State of Washington if performances originating without the State may be heard within the State.

Section 8 supplies a fictitious definition of doing business which would subject appellants to the jurisdiction of the Washington State Courts if any of their agents should merely use the highways of the State or should investigate infringements of their copyrighted compositions therein. The purpose of this fiction is to give the Courts of the State jurisdiction over the appellants, all of whom are non-residents, even though they do not do business within.

Section 9 permits the bringing of actions against such non-residents on substituted service made on the Secretary of the State. In any action brought under Section 9, the Court must appoint a receiver who must seize the copy-

righted works of all copyright owners in the "combination, including all of the rights to suits for infringements and damages in both State and Federal Courts, and all choses in action and all sums due on contracts and licenses." The failure to submit to the jurisdiction of the Court and to comply with the statute results in the forfeiture and seizure of all the appellants' copyrighted works to the State of Washington regardless of the actual situs of such works.

It is alleged, *without contradiction*, that the copyrighted works of all appellants have been used in the State of Washington (R. 23-4, 27-8); that appellants are all non-residents (R. 3); that the copyrighted works of each of the appellants have a value ranging from a million dollars down to one hundred thousand dollars (R. 8-12); that the right to perform the copyrighted musical works of all appellants is presently licensed to 528 users of music in the State of Washington (R. 18); and that under these contracts certain royalties must be paid to appellants. (Exhibits F, G and H; R. 69, 72, 73)

In the face of all these provisions of the statute and the allegations of the complaint, appellees assert, first, that the statute does not attempt to operate extraterritorially and, secondly, that the rights and property of appellants outside the State of Washington are not affected by the State statute. Why then does the statute contain provisions which make certain acts criminal which are performed wholly without the state, and why does the statute subject appellants to the jurisdiction of the state courts when they neither reside in the state nor do business therein, and why does the statute give appellants' copyrights an artificial situs within the State of Washington, and why does the statute provide that an officer of the Washington court shall execute an involuntary assignment which must be filed not within the State of Washington but in the office of the Register of Copyrights at Washington, D. C.?

The obvious fact is that the statute has no other purpose than to regulate business done wholly without that state.

The fictions through which the State of Washington attempts to bring these out-of-State acts as well as these non-residents and their property into the State can neither convert extra-territorial acts into intra-State transactions, nor give the copyrights of the non-resident appellants a *situs* within the State. See *Morrison* v. *California*, 291 U. S. 82, 90. Yet the State Statute *attempts* to do so, and will succeed in so doing unless the injunction prayed for by appellants be granted. Since the State Statute affects, and in fact attempts to confiscate appellants' property without the State, the value of that property furnishes the standard by which the jurisdictional amount is measured. See *Healy* v. *Ratta*, 292 U. S. 263, where this Court said (P. 9-D. C. reply brief).

After arguing that the Society has no standing in court because it has no property rights "for the purpose of protecting performing rights of its members' copyrights" (appellees' brief, p. 17) appellees make the following startling assertion at page 29:

> "the appellants have bargained away under these contracts all rights of every description pertaining to the licensing of the performing rights in their copyrights. The statute under attack affects only the licensing of performing rights. Plainly, the individual appellants have not and will not have until December 31, 1940, any interest in the matter in controversy sufficient to give them any standing as complainants in this action or to establish any jurisdictional amount on their behalf.
>
> "Appellants have vested exclusively and irrevocably the right to bring any action to protect such public performing rights, and have disabled themselves from being parties to these proceedings."

In one breath appellees contend that the Society has no standing in court because it has no interest in these performing rights and in the next breath they argue that appellants individually have no standing in court because they have assigned all their performing rights until Decem-

ber 31, 1940, to the Society. Certainly these rights are not suspended in mid-air. They are vested somewhere. The bill of complaint shows quite clearly that the rights of the respective appellants are of two classes. First, they sue jointly on behalf of all members of the Society for the injury to their joint rights as represented by their assignments to the Society for the period expiring December 31, 1940.

The value of the injury to this right which the statute causes is in excess of $60,000 a year. The value of the injury to the *individual* rights of the appellants by reason of the destruction of their copyrights resulting from the operation of this statute ranges from $1,000,000 down to $100,000 quite apart from the value of their joint rights as members of the Society. It is for that reason that appellants in their individual capacity have joined in this action with Gene Buck who is suing individually and on behalf of all the members of the American Society of Composers, Authors and Publishers.

In their conclusion appellees refer to the decision of the three judge court in Montana consisting of Circuit Judge Haney and District Judges Pray and Baldwin. A very substantial portion of the opinion of Circuit Judge Haney is quoted. No mention is made, however, of the dissenting opinion by District Judge Baldwin to which the attention of this Court is respectfully directed. This dissenting opinion was not called to the attention of counsel for appellants until after preparation of the brief in the companion case of *Gibbs* v. *Buck*, No. 276.

The burden of the majority opinion of Judge Haney in the Montana case lies in the statement that "there is no showing that the cost of compliance will not be returned in greater income." It will cost at least $300,000 to *attempt* to comply with this statute. Even if the expendiure of this $300,000 is made, the lists furnished will not be complete and therefore will not be in full compliance with the re-

quirements of the statute, since it is impossible to obtain all the information required by the State Statute (R. 171).

It is submitted that the arguments advanced in the majority opinion of Judge Haney in the Montana case are fully answered by the dissenting opinion of Judge Baldwin. Copies of both opinions will be handed up on the argument.

Appellees' brief seeks to answer point II of Appellants' brief (which is the same in an abbreviated form as "B" of point 1 of our brief in *Gibbs* v. *Buck*, the Florida case) by citing *Holt* v. *Indiana Manufacturing Company*, 176 U. S. 68. In that case the claim was that a state tax on the capital stock of a corporation was invalid because, aside from some tangible property, the stock represented the supposed value of letters patent. It was contended that the federal Circuit Court in which the suit was brought had jurisdiction because the action arose "under the patent * * * laws of the United States," and because what is now subdivision 14 of Section 24 of the Judicial Code applied. This Court held that the suit did not arise under the patent laws. It is true that this Court said that the statutes which preceded subdivision 14 of Section 24 "referred to civil rights only;" and it also said that state legislation denying equal protection of the laws was governed by what is now subdivision 1 of Section 24. However, as was pointed out in our brief in the Florida case, this Court later in *Truax* v. *Raich*, 239 U. S. 33, affirmed a decision of the District Court of Arizona (219 Fed. 273) which invalidated a statute of Arizona on the ground that it denied the equal protection of the laws. In the District Court it was specifically held (see paragraph 4 of the Syllabus and page 283) that an allegation "of the amount in controversy" was not necessary to give the court jurisdiction. This Court in its opinion made no reference to this point but we think that it must have considered that the District Court was correct, otherwise it would have dismissed the case for lack of jurisdiction. This was the construction placed upon the decision by Judge Learned Hand in *Marcus Brown* v. *Pollack*, 272 Fed. 135, 140. If

this interpretation of this Court's decision is correct, then it follows that if state legislation deprives one of the equal protection of the law, a federal court has jurisdiction over a suit to enjoin enforcement of such legislation irrespective of the amount in controversy. In addition, the appellants here and the appellees in the Florida case possess the right or privilege, secured to them by the Constitution of the United States, that their copyrights shall be unimpaired and unabridged by state legislation. In this aspect the case falls within the express language of subsection 14 of Section 24 of the Judicial Code (for copy of the Section, see page 36 of our brief in the Florida case).

Of course the imposition of a tax on the capital stock of a corporation, even though a part of the value of the latter is attributable to a patent, is a far different thing from the attempt by state legislation to deprive a copyright owner of some of the exclusive rights given to him by the Copyright Act. The Constitution protects him from impairment or abridgment of those rights. This Constitutional right or privilege was created by the Constitution in the sense that it did not exist prior thereto.

CONCLUSION.

THE DECREE APPEALED FROM SHOULD BE REVERSED WITH DIRECTIONS TO GRANT THE INTERLOCUTORY INJUNCTION PRAYED FOR.

Respectfully submitted,

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LOUIS D. FROHLICH,
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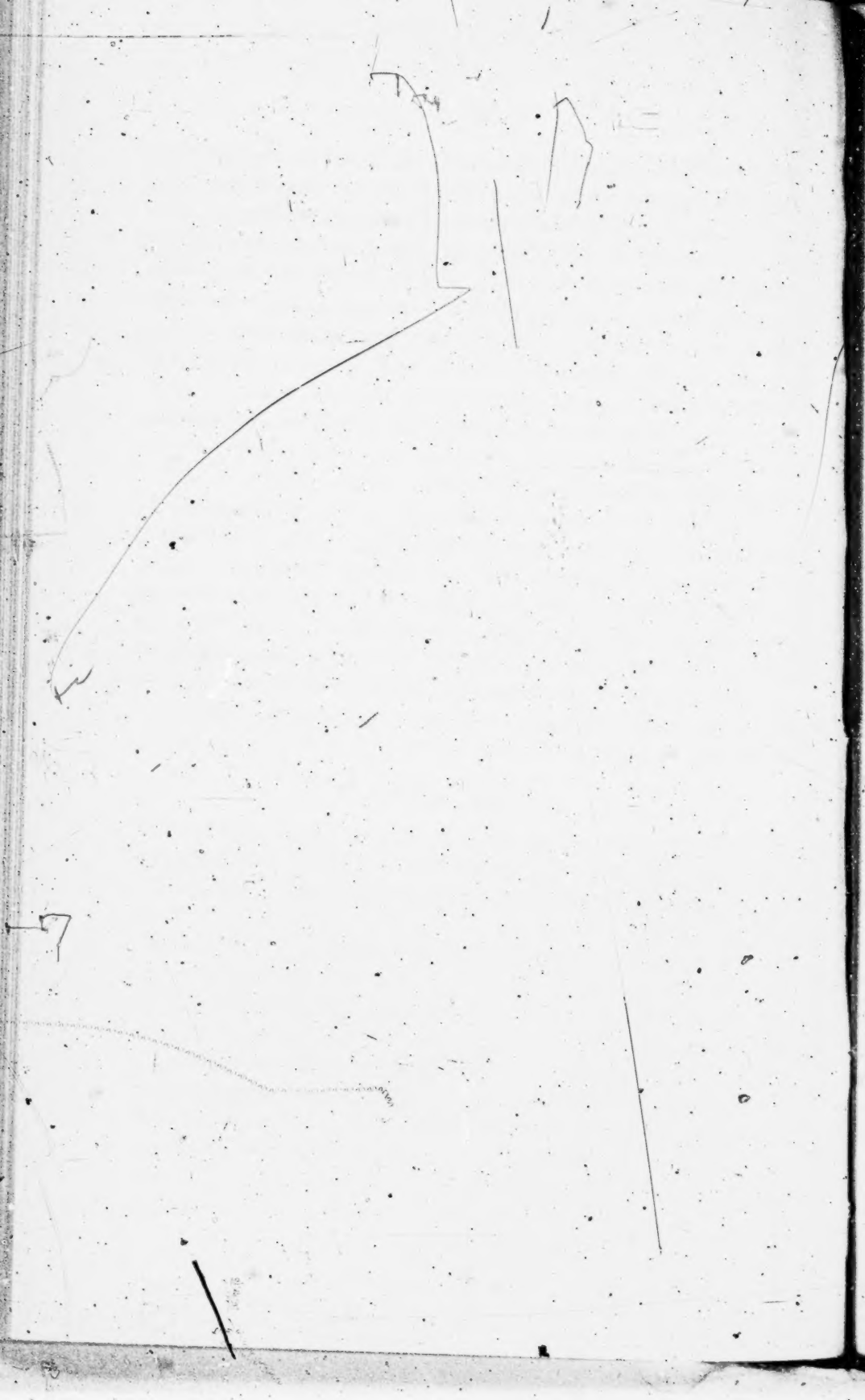
Counsel for Appellants.

January, 1939.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 329

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS ET AL., *Appellants,*

vs.

PHIL GALLAGHER, AS STATE TREASURER OF THE STATE OF WASHINGTON, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

APPELLEES' ANSWER TO STATEMENT AS TO JURISDICTION.

B. GRAY WARNER,
EDWIN C. EWING,
HARRY H. JOHNSTON,
RALPH E. FOLEY,
A. W. SWANSON,
H. W. COVALT,
SMITH TROY,
PAUL O. MANLEY,
JOHN D. EVANS,
GLENN L. BEAN,
SAM M. DRIVER,
ALFRED J. SCHWEPPE,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 329

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS; CARL FISCHER, INC., G. SCHIRMER, INC., IRVING BERLIN, INC., DEEMS TAYLOR, OLEY SPEAKS, WILLIAM J. HILL, ANNE PAUL NEVIN, ELLA HERBERT BARTLETT AND JANE SOUSA,

Appellants,

vs.

PHIL GALLAGHER, AS STATE TREASURER OF WASHINGTON; CLIFF YELLE, AS STATE AUDITOR OF WASHINGTON; ERNEST N. HUTCHINSON, AS SECRETARY OF THE STATE OF WASHINGTON; G. W. HAMILTON, AS ATTORNEY GENERAL FOR THE STATE OF WASHINGTON; B. GRAY WARNER, AS DISTRICT ATTORNEY OF KING COUNTY OF WASHINGTON; HARRY H. JOHNSTON, AS DISTRICT ATTORNEY OF PIERCE COUNTY OF WASHINGTON; RALPH E. FOLEY, AS DISTRICT ATTORNEY OF SPOKANE COUNTY OF WASHINGTON; A. W. SWANSON, AS DISTRICT ATTORNEY OF SNOHOMISH COUNTY OF WASHINGTON; H. W. COVALT, AS DISTRICT ATTORNEY OF WHATCOM COUNTY OF WASHINGTON; SMITH TROY, AS DISTRICT ATTORNEY OF THURSTON COUNTY OF WASHINGTON; PAUL O. MANLEY, AS DISTRICT ATTORNEY OF GRAYS HARBOR COUNTY OF WASHINGTON; JOHN D. EVANS, AS DISTRICT ATTORNEY OF YAKIMA COUNTY OF WASHINGTON; GLENN L. BEAN, AS DISTRICT ATTORNEY OF WALLA WALLA COUNTY OF WASHINGTON; SAM M. DRIVER, AS DISTRICT ATTORNEY OF CHELAN COUNTY OF WASHINGTON; K. M. O. INC., A CORPORATION; JOHN G. LOCKHART,

Appellees.

APPELLEES' ANSWER TO APPELLANTS' STATEMENT AS TO JURISDICTION.

A Direct Appeal to This Court Does Not Lie from the Judgment of the District Court Dismissing Appellants' Bill of Complaint on the Ground of Lack of Jurisdiction.

The appellants have applied directly to this Court from the decree of dismissal entered on June 28, 1938, in reliance upon the provisions of Section 266 of the Judicial Code, granting a direct appeal to the Supreme Court from an order of a three-judge statutory court granting or denying, after a hearing on the application therefor, an interlocutory order suspending or restraining the enforcement, operation or execution of any statute of a State.

The provisions of Section 266 permitting a direct appeal do not apply to this case. The findings of fact, conclusions of law and decree entered by the three-judge court dismissed the bill of complaint solely on the jurisdictional ground that the appellants have failed to show that the requisite amount was in controversy. The hearings held by the three judges were devoted to arguments on the preliminary question of jurisdiction raised by the appellees' motion to dismiss the bill of complaint. The bill of complaint having been dismissed for lack of jurisdiction, the determination of which was necessarily preliminary to any action of the court upon appellants' application, the three judges never functioned as a statutory three-judge court. The fact that the decree incidentally recites that the interlocutory injunction is denied cannot affect the fact that the sole determination of the case made by the court was upon a jurisdictional ground.

A three-judge court has a purely statutory existence. Its jurisdiction can be invoked only for the specific purpose of passing upon an application for an interlocutory injunction restraining the enforcement of a State statute. The pur-

pose of Section 266 in permitting a direct appeal from the decision of a three-judge court, after a hearing on the application for an interlocutory injunction, is to permit a speedy determination by the court of last resort in the important class of cases involving the validity and enforcement of a State statute.

Stratton v. *St. Louis S. W. Ry.*, 282 U. S. 10, 14.

This Court has held that the provisions of Section 266, requiring the presence of a three-judge court, necessarily assume that the District Court has jurisdiction. The preliminary question as to jurisdiction of a three-judge court need not be determined by the three judges, but may be determined by a single district judge.

Ex parte Poresky, 290 U. S. 30, 31, 32.

Where, as in the instant case, either a district judge or the three judges determine, in advance of any determination of the merits of complainant's application for an interlocutory injunction, that the court lacks jurisdiction, and dismiss the bill of complaint for that reason, the three-judge court, even though called, has never functioned for the purpose provided in Section 266, and hence the provisions for a direct appeal have no application.

This Court has repeatedly held that when it has been determined, either by a district judge, sitting alone, or by three judges, that the complainant has failed to show grounds sufficient to invoke the jurisdiction of a three-judge court under Section 266, then, even though the three-judge court may have been properly convened, its action is no longer prescribed, and no direct appeal to the Supreme Court lies from the decision denying, for lack of jurisdiction, a hearing before the three-judge court.

Oklahoma Gas & Electric Co. v. *Oklahoma Packing Co.*, 292 U. S. 386;

California Water Service Co. v. *City of Redding*, 58 Sup. Ct. Rep. 865;
Ex parte Buder, 271 U. S. 461;
Gully v. *Interstate Natural Gas Co.*, 292 U. S. 16;
Ex parte Poresky, 290 U. S. 30.

Here, there has been a determination that the appellants' bill of complaint fails to establish jurisdiction in either the three-judge or any other Federal court to hear the application for an interlocutory injunction. Under the rule determined by this Court in the cases cited above, the Court's decision being on a jurisdictional ground, appellants may not take an appeal direct to this Court.

The major part of appellants' statement as to jurisdiction is not addressed to the question of the jurisdiction of this Court, but is devoted to the merits of the appeal. We reserve our answer to these arguments until the appropriate time after this Court has determined whether or not it has jurisdiction of the appeal.

Respectfully submitted,

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IN THE

SUPREME COURT

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No. 329

GENE BUCK, individually and as President of the American Society of Composers, Authors & Publishers, *et al.*,
Appellants,

v.

PHIL H. GALLAGHER, individually and as State Treasurer of the State of Washington, *et al.*, *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

MOTION TO DISMISS

G. W. HAMILTON,
Attorney General of the State of Washington,

JOHN EGAN BELCHER,
Assistant Attorney General of the State of Washington.

Temple of Justice, Olympia, Washington.

MOTION TO DISMISS

G. W. Hamilton, as Attorney General of the State of Washington, one of the appellees, and attorney for all State officers named as defendants and appellees, moves the Court to dismiss the appeal filed herein, for the following reasons:

(1) Because the Governor of the State of Washington, an indispensible party defendant, has not been made a defendant in this action, which challenges the constitutionality of a statute of the State of Washington,

(2) Because certain state and county officers sued have either resigned or died, and their offices have been filled by others who have qualified therefor and in at least one instance one defendant named was not at the time of the commencement of the action a state officer but that office was held by another who was the qualified and acting treasurer of the state at the time.

(3) Because no citation on appeal has ever been served upon the Attorney General of the State of Washington nor upon his attorney of record herein, although he has appeared in said cause in his own behalf and by an assistant attorney general representing said attorney general and all state officers made defendants herein.

By Section 280, Title 28, U. S. C. A. (Judicial Code, Sec. 266, amended) it is provided:

"No interlocutory injunction suspending or restraining the enforcement, operation or execution of any

statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement * * * shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof. * * * upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a Circuit or district judge, and shall be heard and determined by three judges * * * Said application shall not be heard or determined before at least five day's notice of the hearing has been given to the governor and to the attorney general of the state, and to such other persons as may be defendants in the suit: * * *"

The Governor of the State of Washington, and a necessary party defendant, and whose duty it is to enforce all laws of the State of Washington, is neither sought to be enjoined nor brought into court by any legal process, so that neither this court, nor the three-judge court has acquired jurisdiction of his person or proper jurisdiction of the subject matter of this controversy.

Art. III, Sec. 5, of the Constitution of the State of Washington, provides:

"The governor may require information in writing from the officers of the state upon any subject relative to the duties of their respective offices and shall see that the laws are faithfully executed."

This proceeding was commenced in the United States District Court, Western District of Washington, Southern Division.

Rule 17 (b) District Court Rules provides:

"The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it is organized. In all other cases capac-

ity to sue or be sued shall be determined by the law of the state in which the district court is held; * * *"

The Governor of the State of Washington is charged in Art. III, Sec. 5 of the Constitution of the State of Washington with the duty of seeing "that the laws are faithfully executed."

Rule 5 (b), District Court Rules, provides:

"Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. * * *"

The order made and entered herein on June 9, 1937, by Judge Cushman reads, in part:

"It is further ordered that the complainants forthwith deliver to the Honorable Clarence D. Martin, Governor of the State of Washington, and each of the defendants copy of this order and, if such has not already been done, a copy of their bill of complaint and motion for injunction with supporting affidavits filed herein." (Tr. p. 210.)

Rule 10 (Supreme Court Rules) provides:

(1) "When an appeal is allowed a citation to the appellee shall be signed by the judge or justice allowing the appeal and shall be made returnable not exceeding forty days from the day of signing the citation, whether the return day fall in vacation or in term time, except in appeals from California, Oregon, Washington, Nevada, Idaho, Utah, Arizona, New Mexico, Colorado, Wyoming, and Montana, when the time shall be sixty days. The citation must be served before the return day."

The Attorney General's appearance was duly entered in the cause as was the appearance of E. P. Donnelly, Assistant Attorney General, as attorneys for all state officers named as defendants (Tr. p. 545) and thereafter, and before the entry of the order herein appealed from,

the said E. P. Donnelly was substituted by John E. Belcher, Assistant Attorney General, and neither the said G. W. Hamilton, Attorney General, nor John E. Belcher, Assistant Attorney General, was served with citation of application for nor allowance of appeal to this court, although the record of appearance attached to the transcript on appeal herein clearly shows such appearances.

The Constitution of the State of Washington, Art. III, Sec. 21, provides:

"The Attorney General shall be the legal adviser to all the state officers, and shall perform such other duties as may be prescribed by law. * * *"

By Rem. Rev. Stat., Sec. 112, the legislature of the State of Washington has prescribed the powers and duties of the Attorney General as follows:

"1. To appear for and represent the state before the Supreme Court in all cases in which the State is interested;

"2. To institute and prosecute all actions and proceedings for or for the use of the state which may be necessary in the execution of the duties of any state officer;

"3. To defend all actions and proceedings against any state officer in his official capacity, in any of the courts of this state or the United States.

"4. To consult with and advise the several prosecuting attorneys in matters erlating to the duties of their office, and when, in his judgment, the interests of the state require, he shall attend the trial of any person accused of crime, and assist in the prosecution."

This motion is based upon the record and files herein, and upon the affidavit of John E. Belcher, on file herein, a copy of which, omitting caption, is appended hereto.

G. W. HAMILTON,
Attorney General of the State of Washington,

JOHN EGAN BELCHER,
Assistant Attorney General of the State of Washington.

Temple of Justice, Olympia, Washington.

AFFIDAVIT

UNITED STATES OF AMERICA,
STATE OF WASHINGTON,
COUNTY OF THURSTON. } ss.

JOHN EGAN BELCHER, being first duly sworn, on oath deposes and says that he is a duly appointed, qualified and acting assistant attorney general of the State of Washington and is one of the attorneys of record for all state officers sued herein in their official capacities, and individually, and that the matters and things hereinafter set out are matters and things that have come to his knowledge from an examination of the official records, on file either in the office of the incumbents of said offices or are matters within his personal knowledge, to-wit:

That at the time of the commencement of this action in June, 1937, Clarence D. Martin was and now is the duly elected, qualified and acting Governor of the State of Washington.

That Otto Case, one of the defendants named herein as State Treasurer of the State of Washington, was not at the time of the commencement of this action and is not now and has not been the Treasurer of the State of Washington since the month of January, 1937.

That Phil Gallagher was elected State Treasurer of the State of Washington at the general election in the State of Washington in November, 1936; took office and qualified as such State Treasurer in the month of January, 1937.

That in the month of April, 1937, and prior to the commencement of this action in the United States District Court for the Western District of Washington, Sam Driver named in this action as District Attorney for Chelan County, Washington, was not the district or prosecuting attorney of said Chelan County, Washington, but had theretofore resigned said position and on April 1, 1937, said vacancy was filled by the Board of County Commissioners of said County of Chelan and one Lynn G. Gimmell was so appointed and qualified as such prosecuting attorney on the 1st day of April, 1937.

That one John D. Evans never was at any time prosecuting or district attorney for Yakima County, Washington, although named as such defendant herein.

That at the time of the commencement of this action in the United States District Court one Robert J. Willis was the then duly elected, qualified and acting prosecuting attorney for Yakima County, but thereafter resigned and was, by the Governor of the State of Washington, appointed judge of the superior court for that county on August 31, 1937; that said vacancy in the office of prosecuting attorney for Yakima County was thereafter and on September 7, 1937, filled by the Board of County Commissioners of that county by the appointment of one Lloyd L. Wjehl, who duly qualified and is is now, and at all times since has been the duly appointed, qualified and acting prosecuting attorney of said Yakima County.

That Ernest N. Hutchinson, one of the defendants named, was at the time of the commencement of this action tho duly elected, qualified and acting Secretary of State of the State of Washington, but the said Ernest N.

Hutchinson died on January 30, 1938, and the vacancy caused by his death was filled by the Governor of the State of Washington by the appointment of one Belle Reeves, who qualified on the 7th day of February, 1938, and has at all times since been and now is the duly appointed, qualified and acting Secretary of State of the State of Washington.

This affidavit is made in support of the motion of the Attorney General of the State of Washington for a dismissal of the appeal herein, on the ground of lack of proper parties.

Further affiant sayeth naught.

JOHN EGAN BELCHER,

Subscribed and sworn to before me this 3rd day of October, 1938.

JENNIE M. TATTERSALL,

{Notarial Seal} NOTARY PUBLIC in and for the State of Washington, residing at Olympia.

FILE COPY

Office - Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1938

No. 329

GENE BUCK, individually and as President of the American Society of Composers, Authors & Publishers, *et al.*,
Appellants,

v.

PHIL H. GALLAGHER, individually and as State Treasurer, of the State of Washington, *et al.*,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF ON MOTION TO DISMISS

G. W. HAMILTON,
Attorney General of the State of Washington,

JOHN EGAN BELCHER,
Assistant Attorney General of the State of Washington.

Temple of Justice, Olympia, Washington.

STATE PRINTING PLANT

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1938

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GENE BUCK, individually and as President of the American Society of Composers, Authors & Publishers, *et al.*,
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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF ON MOTION TO DISMISS

G. W. HAMILTON,
Attorney General of the State of Washington.

JOHN EGAN BELCHER,
Assistant Attorney General of the State of Washington.

Temple of Justice, Olympia, Washington.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1938

No. 329

GENE BUCK, individually and as President of the American Society of Composers, Authors & Publishers; CARL FISCHER, INC., G. SCHIRMER, INC., IRVING BERLIN, INC., DEEMS TAYLOR, OLEY SPEAKS, WILLIAM J. HILL, ANNE PAUL NEVIN, ELLA HERBERT BARTLETT and JANE SOUSA,

Appellants,

v.

PHIL GALLAGHER, as State Treasurer of Washington; CLIFF YELLE, as State Auditor of Washington; ERNEST N. HUTCHINSON, as Secretary of State of Washington; G. W. HAMILTON, as Attorney General for the State of Washington; B. GRAY WARNER, as District Attorney of King County of Washington; HARRY H. JOHNSTON, as District Attorney of Pierce County of Washington; RALPH E. FOLEY, as District Attorney of Spokane County of Washington; A. W. SWANSON as District Attorney of Snohomish County of Washington; H. W. COVALT, as District Attorne of Whatcom County of Washington; SMITH TROY, as District Attorney of Thurston County of Washington; PAUL O. MANLEY, as District Attorney of Grays Harbor County of Washington; JOHN D. EVANS, as District Attorney of Yakima County of Washington; GLEN L. BEAN, as District Attorney of Walla Walla County of Washington; SAM M. DRIVER, as District Attorney of Chelan County of Washington; K. M. O. INC., a corporation; JOHN G. LOCKHART,

Appellees.

ATTORNEY GENERAL'S BRIEF ON MOTION TO DISMISS

The Attorney General of the State of Washington has interposed a motion to dismiss the appeal herein on the grounds:

First, Because the Governor of the State of Washington, an indespensible party, has not been made a party defendant in this action, which challenges the constitutionality of a statute of the State of Washington;

Second, Because certain state and county officers sued have either resigned or died, and their offices have been filled by others who have qualified therefor, and in at least one instance one defendant named was not at the time of the commencement of the action a state officer but that office was held by another who was the qualified and acting Treasurer of the State at the time.

Third, Because no citation on appeal has ever been served upon the Attorney General of the State of Washington nor upon his attorney of record herein, although he has appeared in said cause in his own behalf and by an Assistant Attorney General, representing said Attorney General and all state offices made defendants herein.

By Section 380, Title 28, U. S. C. A. (Judicial Code Sec. 266, amended) it is provided:

"No interlocutory injunction suspending or restraining the enforcement, operation or execution of any

statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement * * * shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof * * * upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a Circuit or district judge, and shall be heard and determined by three judges * * * Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the state, and to such other persons as may be defendants in the suit: * * *"

The Governor of the State of Washington, a necessary and indispensable party, and whose duty it is to enforce all laws of the State of Washington, is neither sued, sought to be enjoined nor brought into court by any legal process issuing out of the United States District Court, so that neither this court, nor the three-judge court has acquired jurisdiction of his person or proper jurisdiction of the subject matter of this controversy.

Arneson v. Denny, (D. C. Wash. 1928) 25 F. (2) 993;

State ex rel. Reed v. Gormley, 40 Wash. 601.

Art. III, Sec. 5, of the Constitution of the State of Washington, provides:

"The governor may require information in writing from the officers of the state upon any subject relative to the duties of their respective offices and *shall see that the laws are faithfully executed.*" (Italics ours.)

This proceeding was commenced in the United States District Court, Western District of Washington, Southern Division, in June, 1937 (Tr. 1), against state officers, including the Attorney General, but not the Governor.

Rule 17 (b), District Court Rules, provides:

"The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases, capacity to sue or be sued shall be determined by the law of the state in which the district court is held; * * *"

The Governor of the State of Washington is charged by Art. III, Sec. 5, of the Constitution of the State of Washington with the duty of seeing "that the laws are faithfully executed."

But no attempt has been made by appellants to prevent him from performing that duty with respect to the State Statute (ch. 218 of the Laws of Washington for 1937, pp. 1070 to 1085).

Rule 5 (b) District Court Rules provides:

"Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney *unless service upon the party himself is ordered by the court.* * * *" (Italics ours.)

The order made and entered herein on June 9, 1937, by Judge Cushman, reads in part:

"It is further ordered that the complainants forthwith deliver to the Honorable Clarence D. Martin, Governor of the State of Washington, and each of the defendants, copy of this order and, if such has not already been done, *a copy of their bill of complaint and motion for injunction with supporting affidavits filed herein.*" (Tr. p. 210.)

There was served upon the Governor of the State of Washington a copy of the notice of hearing (Tr. p. 234) and the order of Judge Cushman (Tr. p. 210) but no copy of the bill of complaint (Tr. p. 1) or the supporting

affidavits for the motion for temporary injunction (Tr. p. 93) as required by the order (Tr. p. 210).

The bill of complaint in this case seeks to enjoin Otto Case, as State Treasurer of the State of Washington and individually. (Tr. 1.)

Otto Case was not at the time of the institution of this action in 1937, nor is he now, State Treasurer of the State of Washington.

Phil Gallagher was elected State Treasurer in November, 1936, and took office in January, 1937. He was never served with process of any kind in this suit, nor was citation ever served upon him, yet he has been substituted without authority in law as a party defendant.

John D. Evans, originally named as district attorney for Yakima County, never at any time held that position. He now is, and at the time of the commencement of this action was, prosecuting attorney for Whitman County.

The prosecuting attorney of Yakima County at the time of the commencement of this suit was Robert J. Willis, who, voluntarily appeared in said action, but prior to the entry of the order of dismissal herein resigned and was appointed on August 31, 1937, Judge of the Superior Court for Yakima County. He was succeeded on September 27, 1937, by Lloyd C. Wiehl as prosecuting attorney, who has qualified as such. Weihl has never been served with process, nor citation of any kind in this proceeding.

Ernest N. Hutchinson, as Secretary of State of the State of Washington, is one of the defendants sought to be personally enjoined. Mr. Hutchinson died in Seattle January 30, 1938, and Belle Reeves succeeded to the

vacancy caused by his death on February 7, 1938, and has qualified. She has never been served with process, and no attempt has been made to enjoin her, either in her official capacity as a state officer, or individually.

Sam M. Driver, as district attorney of Chelan County, is named as a defendant. This party was not at the time of the commencement of this action district or prosecuting attorney of Chelan County, but the prosecuting attorney of that county on April 1, 1937, and at the time of the commencement of this action, and at all times since was Lynn Gemmill. By their action appellants have neither served process nor citation upon the said Lynn Gemmill, an indespensible party to this action. (Aff. Belcher, Appendix A.)

There is no law in the State of Washington authorizing a revival or continuance of this character of an action against successors in office in their official capacities or individually.

Upon the death or resignation of such state officer the action abates under the common law which, except as modified by statute, is the law of Washington. Rem. Rev. Stat. of Washington, Sec. 143.

State ex rel. King County v. Superior Court, 104 Wash. 268, 176 Pac. 352.

In *Shaffer v. Howard*, 249 U. S. 200, 39 S. Ct. 255, 63 L. Ed. 559, in dismissing an appeal from the District Court of the United States for the Eastern District of Oklahoma (250 Fed. Rep. 873), to review a decree dismissing a bill to enjoin the enforcement of a tax, where the term of offices of the original parties defendant had expired, and their successors had qualified and there was

no law of the State of Oklahoma authorizing a revival or continuance of the cause of action against such successors, this court said:

"Counsel for both parties having stated in answer to an inquiry on the subject submitted to them by the court while the cause was pending after argument under submissioin that the term of office of the defendant officials had expired and their successors had qualified, and that there was no law of the State of Oklahoma authorizing a revival or continuance of the cause of action against such successors, it follows that the controversy has become merely moot, and that we have no authority to further consider or dispose of it. *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, 34, 41 L. Ed. 621, 623, 17 Sup. Ct. Rep. 225; *Chandler v. Dix*, 194 U. S. 590, 592, 48 L. Ed. 1129, 1131, 24 Sup. Ct. Rep. 766; *Pullman Co. v. Croom*, 231 U. S. 571, 575, 58 L. Ed. 375, 34 Sup. Ct. Rep. 182.

"True it is that counsel, in agreeing as to the statement above referred to, suggest that although the successors in office of the former defendants, intend in the discharge of their official duties, to enforce the tax complained of unless enjoined from doing so, nevertheless, in view of the importance to the people of the state that the subject matter of the controversy be here determined, now request a decision of the pending cause irrespective of the parties defendant. But the absence of power which results from such disappearance cannot be supplied by the request referred to, since after all, it amounts to but a suggestion that that be done which there is no authority to do; in other words, that the cause be decided in the absence of the parties whose presence is essential to its decision. *United States v. Boutwell*, 17 Wall. 604, 609, 21 L. Ed. 721, 722; *United States ex rel. Bernardin v.* Rep. 441; *Pullman Co. v. Croom*, 231 U. S. 571, 576, 58 L. Ed. 375, 377, 34 Sup. Ct. Rep. 182.

"It follows, therefore, that the decree below must be reversed, and the cause be remanded with directions to dismiss the bill for want of proper parties.' And it is so ordered."

The Attorney General of the State of Washington, or one of his regularly appointed and qualified assistants,

is the only person authorized by the laws of the State of Washington to represent state officers or who has authority to prosecute or defend actions against the state officers, and any appearance sought to be made in their behalf is neither authorized or binding upon them or either of them.

State v. Gattavara, 182 Wash. 325.

In that case the Supreme Court of the State of Washington, at page 329, said:

"Although the constitutional provision above quoted (Art. III, Sec. 21) is not self-executing when the duty of the Attorney General is prescribed by statute and the statute has for its purpose the authorization of proper state officers to bring actions, that authority is exclusive. As such officer, the *Attorney General* might, in the absence of express legislative restriction to the contrary exercise all such power and authority as the public interest may from time to time require. 6 C. J. 812. See also, *State ex rel. Dunbar v. State Board of Equalization*, 140 Wash. 433, 249 Pac. 996; *State ex rel. Clithero v. Showalter*, 159 Wash. 519, 293 Pac. 100."

The Constitution of the State of Washington, Article III, Sec. 21, provides:

"The Attorney General shall be the legal adviser to all state officers, and shall perform such other duties as may be prescribed by law * * *."

Rule 10 (United States Supreme Court Rules) provides:

(1) "When an appeal is allowed a citation to the appellee shall be signed by the judge or justice allowing the appeal and shall be made returnable not exceeding forty days from the day of signing the citatiion, whether the return day fall in vacation or in term time, except in appeals from California, Oregon, Washington, Nevada, Idaho, Utah, Arizona, New Mexico, Colorado, Wyoming, and Montana, when the time shall be sixty days. The citation must be served before the return day."

The Attorney General's appearance was duly entered in the cause as was the appearance of E. P. Donnelly, Assistant Attorney General, as attorneys for all state officers named as defendants, and thereafter, and before the entry of the order herein appealed from, the said E. P. Donnelly was substituted by John E. Belcher, Assistant Attorney General, and neither the said G. W. Hamilton, Attorney General, nor John E. Belcher, Assistant Attorney General, were served with citation of application for, nor allowance of, appeal to this court, although the record of appearance attached to the transcript on appeal herein clearly shows such appearances.

By Rem. Rev. Stat., Sec. 112, the legislature of the State of Washington has prescribed the powers and duties of the Attorney General as follows:

"1. To appear for and represent the state before the Supreme Court in all cases in which the State is interested;

"2. To institute and prosecute all actions and proceedings for, or for the use of, the state which may be necessary in the execution of the duties of any state officer;

"3. To defend all actions and proceedings against any state officer in his official capacity, in any of the courts of this state or the United States;

"4. To consult with and advise the several prosecuting attorneys in matters relating to the duties of their office, and when, in his judgment, the interests of the state require, he shall attend the trial of any person accused of crime, and assist in the prosecution."

By Rem. Rev. Stat. of Washington, Sec. 890, it is provided:

"Whenever any action or proceeding for damages shall be instituted against any state officer or employe for the performance of any official act, such officer or employe may request the administrative board to au-

thorize the defense of said action or proceeding at the expense of the state."

If then, as appears by the record herein, service of citation on appeal was attempted to be admitted for the Attorney General (Tr. p. 550) but not by him such receipt by one not in any manner authorized by law to accept such service is a nullity and there has been no service upon the attorney of record for state officers, within the time limited by United States District Court Rule 5 (b) and for failure of such service the appeal must be dismissed.

CONCLUSION

As appears from the foregoing, it is respectfully submitted that the appeal herein should be dismissed for the reasons herein set forth.

Respectfully submitted,

G. W. HAMILTON,
Attorney General of the State of Washington,

JOHN EGAN BELCHER,
Assistant Attorney General of the State of Washington.

Temple of Justice, Olympia, Washington.

Appendix "A"

AFFIDAVIT

UNITED STATES OF AMERICA,
STATE OF WASHINGTON,
COUNTY OF THURSTON. } ss.

JOHN EGAN BELCHER, being first duly sworn, on oath deposes and says that he is a duly appointed, qualified and acting assistant attorney general of the State of Washington and is one of the attorneys of record for all state officers sued herein in their official capacities, and individually, and that the matters and things hereinafter set out are matters and things that have come to his knowledge from an examination of the official records, on file either in the office of the incumbents of said offices or are matters within his personal knowledge, to-wit:

That at the time of the commencement of this action in June, 1937, Clarence D. Martin was and now is the duly elected, qualified and acting Governor of the State of Washington.

That Otto Case, one of the defendants named herein as State Treasurer of the State of Washington, was not at the time of the commencement of this action and is not now and has not been the Treasurer of the State of Washington since the month of January, 1937.

That Phil Gallagher was elected State Treasurer of the State of Washington at the general election in the State of Washington in November, 1936; took office and qualified as such State Treasurer in the month of January, 1937.

That in the month of April, 1937, and prior to the commencement of this action in the United States District Court for the Western District of Washington, Sam Driver named in this action as District Attorney for Chelan County, Washington, was not the district or prosecuting attorney of said Chelan County, Washington, but had theretofore resigned said position and on April 1, 1937, said vacancy was filled by the Board of County Commissioners of said County of Chelan and one Lynn G. Gimmell was so appointed and qualified as such prosecuting attorney on the 1st day of April, 1937.

That one John D. Evans never was at any time prosecuting or district attorney for Yakima County, Washington, although named as such defendant herein.

That at the time of the commencement of this action in the United States District Court one Robert J. Willis was the then duly elected, qualified and acting prosecuting attorney for Yakima County, but thereafter resigned and was, by the Governor of the State of Washington, appointed judge of the superior court for that county on August 31, 1937; that said vacancy in the office of prosecuting attorney for Yakima County was thereafter and on September 7, 1937, filled by the Board of County Commissioners of that county by the appointment of one Lloyd L. Wiehl, who duly qualified and is is now, and at all times since has been the duly appointed, qualified and acting prosecuting attorney of said Yakima County.

That Ernest N. Hutchinson, one of the defendants named, was at the time of the commencement of this action the duly elected, qualified and acting Secretary of State of the State of Washington, but the said Ernest N.

Hutchinson died on January 30, 1938, and the vacancy caused by his death was filled by the Governor of the State of Washington by the appointment of one Belle Reeves, who qualified on the 7th day of February, 1938, and has at all times since been and now is the duly appointed, qualified and acting Secretary of State of the State of Washington.

This affidavit is made in support of the motion of the Attorney General of the State of Washington for a dismissal of the appeal herein, on the ground of lack of proper parties.

Further affiant sayeth naught.

JOHN EGAN BELCHER,

Subscribed and sworn to before me this 3rd day of October, 1938.

JENNIE M. TATTERSALL,

{Notarial Seal} NOTARY PUBLIC in and for the State of Washington, residing at Olympia.

FILE COPY

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IN THE

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GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, *et al.*,

Appellants,

vs.

PHIL H. GALLAGHER, Individually and as State Treasurer of the State of Washington, *et al.*,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

APPELLEES' BRIEF

G. W. HAMILTON, Attorney General of the State of Washington,
JOHN E. BELCHER, Assistant Attorney General of the State of Washington,
ALFRED J. SCHWEPPE,
Seattle, Washington,
Counsel for Appellees.

THE ARGUS PRESS, SEATTLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 329

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, *et al.*,

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APPELLEES' BRIEF

STATEMENT OF THE CASE

This is an appeal from a decree of dismissal, for want of jurisdiction, in an injunction suit brought by the plaintiffs herein to enjoin the defendant public officials of the State of Washington from enforcing a state statute (Laws of Washington 1937, Chapter 218) on the ground that such statute is in conflict with the Federal Constitution.

The bill of complaint, motion for interlocutory injunction, and supporting affidavits were filed May 28,

1937. The act, the enforcement of which was sought to be enjoined, went into effect on June 9, 1937 (Wash. Const. Art. 2, sec. 31; Wash. Const., Amendment 7). The appellees filed motions to dismiss (R. 221, R. 184) upon various grounds, including, among others, that the bill of complaint did not show, on its face, that the jurisdictional amount of $3,000 was involved as a prerequisite to federal jurisdiction of the cause, and also that the bill of complaint did not state a cause of action for relief in equity. The motions (R. 184, 221) also denied that the jurisdictional amount was involved and thus squarely put in issue at the hearing on the interlocutory injunction, the showing of jurisdictional amount in the entire record. *KVOS v. Associated Press*, 299 U. S. 269, 278; R. 272, 24 F. Supp. 541, 549; *First National Bank v. Louisiana Comm.*, 264 U. S. 308, 310. In addition thereto, the appellees filed affidavits in opposition to the application for the injunction (R. 225, R. 226, R. 239).

The cause came on to be heard before a statutory three-judge court under section 266 of the Judicial Code (28 U.S.C.A. §380) on June 29, 1937, upon the application for an interlocutory injunction, the opposing motions to dismiss and affidavits, and some oral testimony which appellants were allowed to introduce at that time (R. 242-5). After the hearing the court took the case under advisement. Some months later, to-wit, on February 9, 1938, the court invited additional briefs on the question of the jurisdictional amount involved in the case (R. 246; 247). On May 9, 1938, an opinion was filed by the three-

judge court, holding that the case should be dismissed for want of jurisdiction as a federal court, in that the jurisdictional amount was not involved (R. 248, *et seq.*; 24 F. Supp. 541).

The court limited its decision to that point only; it did not pass upon the equitable jurisdiction of the court, which was also challenged by the motion to dismiss; nor did it in any way whatsoever pass, in the exercise of its judicial discretion, upon the question whether an interlocutory injunction should be granted or denied upon the showing made in the affidavits and counter-affidavits.

For this reason, it may be here said parenthetically, if it be held on this appeal that the court below does have jurisdiction as a federal court, and that the complaint does state a cause within the equitable jurisdiction of the court, the cause must be remanded to the court below to pass on the merits of the application for an interlocutory injunction, because, under section 266, that is a matter addressed to the judicial discretion of the court below.

Bordens Co. v. Baldwin, 293 U. S. 194, 213;
Alabama v. U. S., 279 U. S. 229, 231;
Wilshire Oil Co. v. U. S., 295 U. S. 100;
Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 347.

On the point of the jurisdictional amount, the statutory court held both that the complaint did not allege a case within the jurisdiction of the court, and that in any event, the sufficiency of the jurisdictional amount having been challenged, the requisite amount had not been established by competent evidence.

On June 2, 1938, the complainants filed an application, returnable on the 28th day of June, 1938, why an order should not be made permitting the complainants to offer oral testimony by witnesses, at a time to be fixed by the court, or by deposition, at times and places to be fixed by the court, upon the question of the value of the matter in controversy and matters incidental thereto (R. 284). Appellees noticed for the same day the presentation of findings of fact, conclusions of law and decree of dismissal (R. 302). A hearing was had on the 28th day of June, 1938 (R. 286) at which hearing complainants' counsel, without having previously given notice of intention to do so, asked the court immediately to hear the testimony of three witnesses brought to the hearing. A colloquy then ensued between complainants' counsel and Presiding Judge Haney (R. 290-297) relating to the jurisdictional amount in controversy.

After hearing further argument on the matter of jurisdiction (R. 297-302) the court denied the application to take additional oral testimony (R. 303) and entered its findings of fact (R. 305) to the effect that the allegations of the bill of complaint are insufficient to show that the value of the matter in controversy exceeded the jurisdictional amount of $3,000; that the record does not show the value of the matter in controversy as exceeding the jurisdictional amount, and that the record does not show what is the value of the matter in controversy. And the court likewise filed its conclusions of law that neither the bill of complaint nor the record disclose that the matter is within the jurisdiction of the court, for want

of a requisite jurisdictional amount (R. 306). And in conformity with the findings and conclusions, the court filed its decree of dismissal on June 28, 1938 (R. 325) on the ground that neither the allegations of the bill of complaint nor the record showed the jurisdictional amount, and that the application for the injunction should be denied upon the ground that the cause was not within the jurisdiction of the court as a federal court. The merits of the application for the interlocutory injunction were in no way passed on.

This appeal followed.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

This court noted probable jurisdiction on November 10, 1938, and assigned this cause for argument immediately following hearing of the appeal in *Gibbs v. Buck*, No. 276.

The appellees have heretofore filed in this cause an answer to the appellants' statement as to jurisdiction. In this answer the appellees suggest that the Supreme Court of the United States is without jurisdiction of this appeal. The reasons set forth in said answer will not be here repeated, except to point out that under the provisions of Section 266 of the Judicial Code (28 U.S.C. §380) a single District Judge can dismiss a cause as not within the jurisdiction of the federal court; that a three-judge court is requisite only where the lower court has jurisdiction of the cause as a federal court; that except where three judges are re-

quired, a direct appeal does not lie to this court. *Ex parte Poresky*, 290 U. S. 30, 31, 32; *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 292 U. S. 386, 391; *Gully v. Interstate Natural Gas Co.*, 292 U. S. 16; *Ex parte Buder*, 271 U. S. 461; *Ex parte Hobbs*, 280 U. S. 168.

In *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 292 U. S. 386, 391, this court said that the issue was:

> "whether a final hearing by three judges was prescribed by that section, and hence whether this court has jurisdiction to hear the appeal * * *. When it becomes apparent that the plaintiff has no case for three judges, though they may have been properly convened, their use is no longer prescribed, and direct appeal here must fail, as well in this case, as where the plaintiff does not press his injunction, *Smith v. Wilson*, *supra*, or his constitutional attack."

In the present case, once it had been determined that the requisite jurisdictional amount was not involved to give the federal court jurisdiction, we suggest that the presence of three judges was no longer required, and that a direct appeal to the Supreme Court must fail.

> "The provision requiring the presence of a court of three judges necessarily assumes that the district court has jurisdiction * * *. That provision does not require three judges to pass upon the initial question of jurisdiction." *Ex Parte Poresky*, 290 U. S. 30, 31-2.

The fact that the three judges concur in the hold-

ing that the federal court is without jurisdiction, seems necessarily to imply that no case is presented for a three-judge federal court; and, therefore, no direct appeal will lie.

Under the decisions of this Court, Judge Cushman might have decided alone that the court was without jurisdiction because the requisite jurisdictional amount was not involved. In such case, manifestly no direct appeal would lie. The situation as to propriety of direct appeal would not seem to be changed merely because three judges concur in a decision which one has the power to make alone, and which if made by him alone would not warrant a direct appeal.

Subject, however, to the foregoing suggestion, we shall assume that the Supreme Court of the United States has jurisdiction of this appeal and address ourselves to the merits of the appeal, which involves solely the question whether the lower court had jurisdiction of the cause.

CRITERIA OF FEDERAL JURISDICTION

The established rule is that a plaintiff suing in a federal court must show in his pleadings, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction. *Smith v. McCullough*, 270 U. S. 456, 459; *Norton v. Larney*, 266 U. S. 511, 515; *Woods v. First Nat. Bank* (C.C.A. 9th) 16 F. (2d) 856; *Fourth Atl. Nat. Bank v. Boston* (C.C.A. 1st) 300 Fed. 29. It is not sufficient that the jurisdiction may be inferred argumentatively from the pleadings, but the averments should be positive. *Hanford v.*

Davies, 163 U. S. 273, 279; *Woods v. First Nat. Bank* (C.C.A. 9th) 16 F. (2d) 856; *Colgate & Co. v. Proctor & G. Co.* (D.C.) 25 F. (2d) 160, and cases cited. Jurisdiction cannot be presumed or inferred, nor founded on surmise. *Anderson v. Watt*, 138 U. S. 694, 702; *Colgate & Co. v. Proctor & G. Co.* (D.C.) 25 F. (2d) 160, and cases cited; *Lynch v. New York*, 293 U. S. 52, 54. The jurisdiction of the federal court being limited, and not general, the presumption is against jurisdiction unless it positively and affirmatively appears. *Hanford v. Davies*, 163 U. S. 273, 279; *Metcalf v. Watertown*, 128 U. S. 586; *Grace v. Central Am. Ins. Co.*, 109 U. S. 278; *Anderson v. Watt*, 138 U. S. 694, 702; *Woods v. First Nat. Bank* (C.C.A. 9th) 16 F. (2d) 856; *Hurley v. Wells-Newton Nat. Corp.* (D.C.) 49 F. (2d) 914, 917; *Colgate & Co. v. Proctor & G. Co.*, 25 F. (2d) 160.

The jurisdiction of the district court is to be determined by the allegations of the bill of complaint. *Moore v. Chesapeake & O. R. Co.*, 291 U. S. 205, 210, and cases cited; *McNutt v. General Motors Acceptance Corp.*, 298 U. S. 178, 189; *KVOS v. Associated Press*, 299 U. S. 269, 277; *Henneford v. Northern Pac. R. Co.*, 303 U. S. 17.

In other words, the pleader must positively allege all the facts showing jurisdiction.

> "If he fails to make the necessary allegations, he has no standing." *McNutt v. Gen. Motors Acc. Corp.*, 298 U. S. 178, 189.

If, when all the allegations of the complaint are considered together, it cannot be fairly said that the jurisdiction appears on the face of the complaint, the

suit should be dismissed by the court *sua sponte*, or upon the defendants' own motion. *KVOS v. Associated Press*, 299 U. S. 269, 277; *Northern Pac. S. S. Co. v. Soley*, 257 U. S. 216; *Mitchell v. Maurer*, 293 U. S. 237, 244; *Minn. v. Northern Sec. Co.*, 194 U. S. 48, 62-3; *Gainesville v. Brown-Crummer Co.*, 277 U. S. 54; *U. S. v. Corrick*, 298 U. S. 435, 440.

It is only if the plaintiff has sufficiently *pleaded* the jurisdictional facts, that an inquiry will be made by the court, either on its own motion, or that of the defendant, for the purpose of determining whether the actual facts support the jurisdictional allegations of the complaint, by a preponderance of the evidence. *McNutt v. Gen. Motors Acc. Corp.*, 298 U. S. 178, 189; *KVOS v. Associated Press*, 299 U. S. 269, 277; *Henneford v. Northern Pac. R. Co.*, 303 U. S. 17.

In the last cited case, *Henneford v. Northern Pac. R. Co.*, 303 U. S. 17, this court denied leave to file an affidavit on the subject of jurisdictional amount, and held that the case should be decided on the record before the court; that the jurisdiction of the district court should be tested by the case made by the bill of complaint. This court, in denying leave to file the affidavit, said,

> "The court is of the opinion that the case should be decided on the record before it and that the jurisdiction of the district court should be tested by the case made by the bill of complaint." (303 U. S. 17, 19)

Only the allegations of the complaint, and not accompanying affidavits or testimony, can be considered in determining the sufficiency of the bill. *Missouri*

Pac. R. Co. v. Norwood, 283 U. S. 249, 253; *Polk Co. v. Glover*, 59 S. Ct. 15, 17.

The gradual increase in the jurisdictional amount was intended to curtail the jurisdiction of the federal courts. Congress having from time to time increased the jurisdictional amount, and having manifested its intention to leave cases involving lesser amounts to be exclusively dealt with by the state courts, "the policy of the statute calls for its strict construction," *Healy v. Ratta*, 292 U. S. 263, 270.

Confirmation of this policy may be found in a number of recent decisions of this court:

Healy v. Ratta, 292 U. S. 263, 270; *McNutt v. General Motors Acc. Corp.*, 298 U. S. 178; *KVOS v. Associated Press*, 299 U. S. 269; *Pope v. Blanton*, 299 U. S. 521; *Henneford v. Northern Pac. R. Co.*, 303 U. S. 17; *United States v. Corrick*, 298 U. S. 435, 440.

In the last cited case this court noticed lack of jurisdiction in the court below, although not raised by the parties.

Having in mind then the principles that the jurisdictional facts must be clearly and positively alleged, that jurisdiction cannot be presumed or inferred argumentatively, or otherwise, that the presumption is against jurisdiction, and that the burden is upon the complainant to establish the jurisdiction, we may consider briefly the legal principles relating to the sufficiency of allegations as to the jurisdictional amount, where required.

The formal allegation that the amount in controversy exceeds the sum of $3,000, exclusive of interests and costs, is sufficient, "unless the bill contains

others which qualify or detract from it in such measure that it cannot fairly be said that the jurisdiction appears on the face of the complaint, in which case the suit should be dismissed by the court *sua sponte*, or on defendant's motion." *KVOS v. Associated Press*, 299 U. S. 269, 277.

In *Lion Bonding Co. v. Karatz*, 262 U. S. 77, 86, this court said:

> "Since the bill in this case discloses that the amount in controversy was less than the jurisdictional amount, the general allegation that it exceeds this amount, is therefore of no avail. *Vance v. W. A. Vandercook Co.*, 170 U. S. 468."

See to the same effect, *First Nat. Bank v. Louisiana Commission*, 264 U. S. 308, 310, where the bill and affidavits were held insufficient as to jurisdictional amount.

With these general principles in mind, we shall now submit reasons why the court below was without jurisdiction of this cause.

ARGUMENT

I.

The district court was without jurisdiction as a federal court to entertain the bill of complaint, because a jurisdictional amount of $3000.00 was required.

The present cause is one arising under the constitution and laws of the United States, and, therefore, under Section 24 of the Judicial Code (1) (28 U.S.C. §41 (1)) a jurisdictional amount of $3,000 was requisite. *U. S. v. Sayward*, 160 U. S. 493, 497, 498;

McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 182; *Holt v. Indiana Mfg. Co.*, 176 U. S. 68, 71-73; *Dewar v. Brooks* (D.C.) 16 F. Supp. 636, 638, 639.

Counsel's argument, on page 25 of appellants' brief, that they make a case under Section 24 of the Judicial Code (14) (28 U.S.C. §41 (14)) citing *Raich v. Truax*, 219 Fed. 273, 283, is conclusively disposed of by *Holt v. Indiana Mfg. Co.*, 176 U. S. 68, 71, 73, where the same section of the Judiciary Act was involved.

II.

The allegations of the complaint are not sufficient to sustain jurisdiction as to the society.

We set forth below all of the allegations of the bill of complaint bearing on the adequacy of the Society's showing of the requisite jurisdictional amount.

Appellant, the Society, alleges that the membership of the Society consists of more than 1,000 authors, composers and publishers of musical works; (R. 2) that the value of the matter in dispute between complainants and defendants is in excess of $3,000 (R. 4) and that the Society has "mutual working arrangements" with foreign societies of composers throughout the world, whose membership aggregate 44,000 individuals, to license the public performance of the compositions of the members of these foreign societies (R. 19). That an attempt to provide the information required by Chapter 218 of the Laws of 1937 of the State of Washington, with reference to the copyrights of the 44,000 members of the foreign societies, would

cost "far in excess of $50,000" (R. 20). That all the users of music in the State of Washington paid in 1936, $60,530.68 in license fees for the use of the musical compositions of the more than 44,000 composers represented by the Society and its affiliated foreign groups (R. 18, 21); and that the cost of attempting to compile the information and list required by the statute for the Society and its foreign affiliated societies would be in excess of $300,000, "which sum would have to be expended for research work with reference to the past history of each and every copyright owner, by every one of the 44,000 members of the Society and its affiliated societies, lawyers' fees for opinions as to the rights of parties involved with respect to the ownership, grants, licenses and other interests in the respective copyrights, clerical help and other incidental expenses" (R. 22); that the enforcement of the statute would result in the loss to the Society of the revenue received by the Society from its license contracts within the State of Washington (R. 30).

The allegations as to the amount of $60,530.68 received in 1936 on behalf both of its thousand members and of the 44,000 members of the foreign societies, are obviously non-segregable, it being impossible for anyone to determine what proportion, if any, of the total amount collected was on behalf of the Society and its members and what on behalf of the foreign societies and composers. So far as appears from the complaint, the entire $60,530.68 collected in the State of Washington may have been paid to the 44,000 members of the foreign societies and nothing to the Society's own members. So far as appears from

the complaint none of the compositions of which the Society owns the public performing rights has ever been used in the State of Washington. The same impossibility of segregation exists with reference to the allegation of the cost of compiling the information required by the Washington statute, only a single amount being pleaded both for the Society and the 44,000 foreign composers.

These foreign composers or their societies are not parties complainant in this action. The Society's only allegation that it has "mutual working arrangements" with the foreign societies is a term so vague as to be meaningless. The "mutual working arrangements" themselves are not set out in the pleading. If the Society has adopted a plan of doing business which renders it impossible to establish the jurisdictional amount within established rules (See Circuit Judge Haney's observation, R. 290) that can hardly be the concern of any court or of these appellees.

The Society itself certainly cannot claim to stand here as a party complainant to defend the alleged treaty or financial rights of foreign composers under the vague and undefined allegation of "mutual working arrangements." The rule is clear that a party complainant can raise a federal question and claim the jurisdiction of a federal court only on his own behalf and no on behalf of third parties.

Ludeling v. Chaffe, 143 U. S. 301;
Giles v. Little, 134 U. S. 645, 649;
McCandless v. Pratt, 211 U. S. 437.

The principle is well stated in *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 289:

"Besides, a litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage."

There being no method of determining from the allegations of the bill of complaint in this action the value of the right of the Society and its own membership to license public performance of musical copyrights, or of ascertaining of any loss which the Society itself would suffer in the event the statute would be complied with, the Society has not made the requisite showing of $3,000, exclusive of interest and costs herein.

In the case of *McNutt v. General Motors Acceptance Corp.*, 298 U. S. 178, this court clearly prescribed the test to be applied where an injunction is sought against the enforcement of a state statute. In that case, just as here, the complainants, for the manifest purpose of making the jurisdictional amount, set up large figures: that the net worth of the business exceeded $50,000; that it annually purchased in Indiana contracts aggregating in excess of $7,000,000; that it paid $13,000 annual rental in Indiana; that its Indiana payroll annually amounted to $150,000. This court said (p. 181):

"Respondent invokes the principle that jurisdiction is to be tested by the value of the object or right to be protected against interference. *Hunt v. New York Cotton Exchange*, 205 U. S. 322; *Bitterman v. Louisville & Nashville R. Co.*, 207 U. S. 205; *Berryman v. Whitman College*, 222 U. S. 334; *Glenwood Light Co. v. Mutual*

Light Co., 239 U. S. 121; *Healy v. Ratta*, 292 U. S. 263. But in the instant case, the statute does not attempt to prevent respondent from conducting its business. There is no showing that it cannot obtain a license and proceed with its operations. The value or net worth of the business which respondent transacts in Indiana is not involved save to the extent that it may be affected by the incidence of the statutory regulation. The object or right to be protected against unconstitutional interference is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed. The particular allegations of respondent's bill as to the extent or value of its business throw no light upon that subject. They fail to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve. The bill is thus destitute of any appropriate allegation as to jurisdictional amount save the general allegation that the matter in controversy exceeds $3,000. That allegation was put in issue and the record discloses neither finding nor evidence to sustain it."

Moreover, under the rule of the *McNutt v. General Motors Acceptance Corp.*, 298, U. S. 178, case, even if the Society had in fact set forth in its bill of complaint a segregable amount representing the gross business done in this state for its membership, there would still be lacking in the record any statement of the "net worth or value" of that business, and of the

extent of the curtailment thereof and consequent loss which the enforcement of the statute would involve. In other words, if the gross business done within this state by the Society represented a loss, and not a gain, there would be no ascertainable net worth or value for any rights exercised by the Society within the state.

Furthermore, the bill of complaint clearly points out that the Society is a non-profit association organized for the purpose of protecting the performing rights of its members' copyrights (R. 13). The articles of association attached to the bill of complaint and incorporated therein as Exhibit "D" (R. 41-60) emphasize other allegations that the purpose of the Society is a non-profit organization to provide for them the collection of license payments and the distribution thereof to the members of the Society (R. 15, 16, 36-37).

The Society as a non-profit organization cannot of itself suffer any pecuniary loss, through the enforcement of this statute. The loss, if any resulted, would be suffered by the individual members through a diminution of their various distributive portions.

The situation in this case is governed by the rule laid down in the case of *KVOS v. Associated Press*, 299 U. S. 269. In that case the Associated Press, a membership corporation organized under the laws of the State of New York, sought to maintain an action as party plaintiff against a radio station which was pirating news gathered by the Associated Press for the use of its members and published in the newspapers owned by its membership. The showing was

made in that case that the total amount of the transactions carried on by the Associated Press amounted to many millions of dollars. The value of the news gathered was likewise distributed to its membership through the Associated Press releases and the publication thereof in the various newspapers. The cost thereof was equitably divided among the membership. The Associated Press in that case claimed that the pirating of the news jeopardized the $8,000 per month it received from the three newspapers in the area affected by the radio news broadcasting and that this amount in controversy was therefore in excess of the jurisdictional amount. The court, however, held, in denying the right of the Associated Press to appear as a party plaintiff for the reason that it had failed to satisfy the jurisdictional requirement, stating (p. 278):

> "* * * The motion required the trial court to inquire as to its jurisdiction before considering the merits of the prayer for preliminary injunction. And in such inquiry complainant had the burden of proof. The only attempt to meet that burden is a reply affidavit filed on behalf of respondent, wherein it is deposed 'that the payments made by newspapers for said news sold to them by complainant in the territory served by said radio station is upwards of $8,000 per month, which is being imperilled and jeopardized by the acts of defendant * * * by its unlawful and wrongful appropriation of complainant's news, and said sum greatly exceeds the sum of Three Thousand Dollars, exclusive of interest and costs, and

> complainant is in danger of losing said memberships and payments if defendant's practices in respect to pirating said news is not enjoined.' This deposition must be read in connection with the statement in the bill that the respondent makes no profit from furnishing news to its members but equitably divides the expense amongst them. The Association cannot, therefore, lose the $8,000 in question * * *."

In the instant case the Society, for and on behalf of its members, licenses the public performance of their copyrights. It distributes the value received for the various compositions less the cost of doing business among its membership. The Associated Press, a membership corporation, was likewise organized for non-profit purposes. If, in *KVOS v. Associated Press*, 299 U. S. 269, it was held that no loss could result to a non-profit corporation through the destruction of the value of its news distribution with a consequent loss to the corporation of $8,000 a month, then how can this unincorporated association claim that it can suffer any loss because of the reduction in amounts paid to its membership?

To paraphrase the language quoted above from *KVOS v. Associated Press*, 299 U. S. 269, the Society cannot itself lose the $60,530 in question. Any such reduction is represented solely, so far as the bill of complaint shows, by a reduction in the amount paid to its members and the foreign societies on account of the licensing of the public performance of their copyrights in the State of Washington.

The conclusion seems inescapable that the rule laid

down in *KVOS v. Associated Press*, 299 U. S. 269, directly applies, and that the Society as a non-profit corporation has failed to show a sufficient right or interest in the matter here in controversy.

III.

The jurisdictional amount as to the individual appellants has not been shown.

The allegations in the bill of complaint which appellants used in their attempts to sustain jurisdiction of the individual appellants, can be summarized as follows:

That each of the publisher appellants owned copyrights valued in excess of $1,000,000; that it would cost each of the publisher appellants in excess of $25,000 for payments to investigators, lawyers, clerks and other expenses to formulate a list of their respective copyrights containing the data required by the state statute (R. 8). That the individual composer appellants each owned copyrights having a capital value in excess of $100,000 (R. 9, 10, 11, 12). That it would cost the individual composer appellants to create an agency within the State of Washington to protect against infringement of their musical copyrights, in excess of $10,000, which expenditure would be necessary in the employment of investigators and other employees (R. 17). That each of the appellants received from the Society in the year 1936 amounts varying from more than $50,000 to amounts in excess of $5,000 for licensing the public performance of their works over the entire world (R. 29).

We refer only briefly to the mass of general conclusions in the bill of complaint involving claims of destruction of the value of the individuals' copyrights, the complete cessation of their income derived from the licensing of copyrights throughout the United States (R. 28, 29, 30, 31). Such general conclusions come within the condemnation often expressed by the federal courts and succinctly stated by a three-judge court in *Hale v. Mann*, 15 Fed. Supp. 1051, 1052, where it is stated:

> "While the bill is replete with legal conclusions and abstract statements to the effect that plaintiffs' business will be destroyed, there are no tangible facts pleaded to support these statements or to lead to any conclusion other than that the act simply constitutes a regulation of, and restriction on, plaintiffs' business. These views with regard to the bill are confirmed by an inspection of the act itself, which, of course, may be and should be considered by the court in connection with this motion to dismiss. If the effect of the act is not to entirely destroy plaintiffs' business, but simply to injure them in the conduct thereof, then it is necessary for them to make some showing both by way of pleading and proof as to the extent of that injury. This, in our opinion, they have signally failed to do upon the trial of the case * * *.
>
> "Accordingly, it follows from what has been said that the case will be dismissed for want of jurisdiction." (p. 1052)

In *Spielman Motor Co. v. Dodge*, 295 U. S. 89, 96, this court said:

> "The bill contains general allegations of irreparable damage and deprivation of 'rights, liberty, properties, and immunities' without due process of law, if the statute be enforced. But the bill failed to state facts sufficient to warrant such conclusions, which alone were not enough."

The allegations as to the capital value of the copyrights owned by each of the individual appellants and their gross income therefrom, collected throughout the world, are ineffectual to establish the requisite jurisdictional amount on behalf of any individual appellant. *McNutt v. General Motors*, 298 U. S. 178. They do not show, in any measure, either the value of any right exercised and business done, or any loss suffered, by any appellant in the State of Washington through the operation of the statute. We are here dealing with a state statute operative only within the territorial limits of the state, which can damage each of the individual appellants only to the extent that it affects his business done within the state.

The only definite allegation concerning the value of each appellant's interest in the right to license public performance of musical copyrights, is the annual amount received by each of the appellants *throughout the United States and in foreign countries.* Nowhere is there an allegation that any individual appellant has ever received any amount, much less $3,000, from the licensing of the public performance of his copyrights in the State of Washington; nor, as a matter of fact, that a single piece of music belonging to the

individual complainants was ever publicly performed in the State of Washington.

Under the rule laid down in the case of *McNutt v. General Motors Acceptance Corp.*, 298 U. S. 178, there must be a positive showing that the net value of the individual's right sought to be protected is definite, and that the cost or loss incurred through the enforcement of the statute would reduce the value of that right by an amount in excess of $3,000. The rule of *McNutt v. General Motors Acceptance Corp.*, 298 U. S. 178, has recently been affirmed in a case analogous to the instant case where this court directed the dismissal of *Polk, et al., v. Blanton, County Judge, et al.*, 10 Fed. Supp. pp. 15 and 18, by a *per curiam* memorandum (296 U. S. 521).

The case of *Polk Co., et al., v. Glover*, 56 Sup. Ct. Rep. 15, relied on by appellants, clearly conforms to the rule laid down in the earlier decisions. In this case, among other allegations, the bill of complaint stated that the complainants had on hand *in the state of Florida*, cans valued at $33,000, which the requirements of the Act in question would render useless. Clearly, an allegation that the Act rendered valueless property worth $33,000, located in Florida, was an affirmative showing of actual loss through the enforcement of the Act, the allegation being necessarily accepted as true for the purpose of considering the motion.

Appellants' contention that mere allegations of cost of conformity with the statute, without any affirmative showing that any of the individual appellants

has a right within the State worth more than the jurisdictional amount of $3,000, obviously cannot be sustained under the decisions of this Court. Appellants' view, if correct, would permit any complainant, without showing any, or perhaps only a nominal interest in the matter in controversy, to maintain an action in a federal court by the mere allegation that the cost of conformity to the statute would be in excess of $3,000. Under such reasoning a complainant, having a right within the state worth only $100, could establish the federal jurisdiction by a showing that cost of conformity would be in excess of the jurisdictional amount.

IV.

Individual appellants cannot aggregate the amount in controversy in order to make up the requisite jurisdictional amount.

Even assuming, for the sake of the argument, that the appellants in this case could, under proper circumstances, aggregate the value of their rights in this controversy, that situation is not here presented. To permit aggregation, there must be a showing of separate sums comprising a total amount representing interests of the individual appellants in the joint matter in controvesry. Here the only figures which appellants claim support an aggregation are the allegations that the amount of $60,530.68 represented the business done in 1936 by the Society and its foreign affiliates in the State of Washington, and that the alleged cost of $300,000 required to be expended by

the Society on behalf of its members and the 44,000 foreign composers. Obviously these sums include amounts due to and costs accruing to the 44,000 foreign composers as well as members of the Society and cannot be used as an aggregation of amounts in controversy belonging to the individual party plaintiffs.

Without a showing of the value of the right of each individual complainant in the State of Washington, there are, of course, no figures to aggregate.

On the other hand even if these individual appellants could claim a right in the public performance of their copyright apart from that represented by the Society, nowhere in the bill of complaint is there any statement as to the value of such a right within the State of Washington or the extent to which it would be affected by the statute. In any event no aggregation could be made of separate rights in various copyrights owned by separate individuals.

Buck, et al., v. Kloeppel, 10 Fed. Supp. 345;
Pinel v. Pinel, 240 U. S. 594;
Wheless v. City of St. Louis, 180 U. S. 379, 380;
Clay v. Field, 138 U. S. 464, 479;
Lion Bonding & Surety Co. v. Karatz, 262 U. S. 77;
Hart Coal Corp. v. Sparks, 9 F. Supp. 825;
Dewar v. Brooks, 16 F. Supp. 636.

Counsel's further attempt to establish a jurisdictional amount for each individual appellant by aggregating the possible penalties which might be exacted under the provision of the act, requires but little notice. This court has held that amounts of penalties

incurred through failure to conform to statutes cannot be aggregated in determining the requisite jurisdictional amount.

In *Healy v. Ratta*, 292 U. S. 263, a case involving the collection of a tax, the claim was made that the penalty should be added to the tax in order to determine the jurisdictional amount. The court said, however, page 268:

> "It has been said that it is the value of the 'object of the suit' which determines the jurisdictional amount in the federal courts, *Mississippi & Missouri R. Co. v. Ward*, 2 Black 485; *Packard v. Banton*, 264 U. S. 140, 142. But this does not mean objects which are merely collateral or incidental to the determination of the issue raised by the pleadings. The statute itself does not speak of objects of the suit. It confers jurisdiction only if 'the matter in controversy exceeds * * * the sum or value of $3,000.00.' It has never been thought that the federal courts have jurisdiction of suits to restrain the collection of a property tax or other money exaction of less than the jurisdictional amount assailed as unconstitutional merely because the penalty for non-payment, which has not been incurred, exceeds that amount. *Atlantic Coast Line Ry. Co. v. Railroad Comm'n.*, 281 Fed. 321. The tax, payment of which is demanded or resisted, is the matter in controversy, since payment of it would avoid the penalty and end the dispute. See *Rose v. Prentiss*, 3 How. 771, 772."

V.

The individual complainants have no interest in the controversy sufficient to enable them to sue or to establish presently any jurisdictional amount on their behalf.

In Exhibits "B" and "C" to the Bill of Complaint (R. 34-37, 38-40) are set forth two typical contracts between the Society on the one hand and Carl Fischer, Inc., and Gene Buck respectively on the other. It is alleged that these contracts are similar to the contracts made by the Society with the other appellants (R. 15). All these contracts extend to the 31st day of December, 1940 (R. 15). Exhibits "B" and "C" contain the following identical provisions. The first paragraph of Exhibit "B" reads in part as follows (R. 35):

> "The Owner sells, assigns, transfers and sets over unto the Society for the term hereof, the entire exclusive right of public performance (as hereinafter defined) in each musical work:
>
> Of which the Owner is a copyright proprietor; or
>
> Which the Owner, alone, or jointly, or in collaboration with others, wrote, composed, published, acquired or owned; or
>
> In which the Owner now has any right, title, interest or control whatsoever, in whole or in part; or
>
> Which hereafter, during the term hereof, may be written, composed, acquired, owned, published or copyrighted by the Owner, alone, jointly or in collaboration with others; or
>
> In which the Owner may hereafter, during the

term hereof, have any right, title, interest or control, whatsoever, in whole or in part.

The exclusive right of public performance in every musical work shall be deemed assigned to the Society by this instrument and shall vest in and be the absolute property of the Society for the term hereof, immediately, upon the work being written, composed, acquired, owned, published or copyrighted."

Paragraphs 4 and 5 of Exhibit "B" read (R. 35-36):

"4. The Owner hereby irrevocably, during the term hereof, authorizes, empowers and vests in the Society *exclusively*, the right to enforce and protect such rights of public performance under any and all copyrights, whether standing in the name of the Owner and/or others, in any and all works copyrighted by the Owner, and/or by others; to prevent the infringement thereof, to litigate, collect and receipt for damages arising from infringement, and in its sole judgment to join the Owner and/or others in whose names the copyright may stand, as parties plaintiff or defendants in suits or proceedings; to bring suit in the name of the Owner and/or in the name of the Society, or others in whose name the copyright may stand, or otherwise, and to release, compromise, or refer to arbitration any actions, in the same manner and to the same extent and to all intents and purposes as the Owner might or could do, had this instrument not been made."

"5. The Owner hereby makes, constitutes and

appoints the Society, or its successor, the Owner's true and lawful attorney, irrevocably during the term hereof, and in the name of the Society or its successor, or in the name of the Owner, or otherwise, to do all acts, take all proceedings, execute, acknowledge and deliver any and all instruments, papers, documents, process and pleadings that may be necessary, proper or expedient to restrain infringements and recover damages in respect to or for the infringement or other violation of the rights of public performance in such works, and to discontinue, compromise or refer to arbitration any such proceedings or actions, or to make any other disposition of the differences in relation to the premises."

The appellants have bargained away under these contracts all rights of every description pertaining to the licensing of the performing rights in their copyrights. The statute under attack affects only the licensing of performing rights. Plainly the individual appellants have not and will not have until December 31, 1940, any interest in the matter in controversy sufficient to give them any standing as party complainants in this action or to establish any jurisdictional amount on their behalf.

Appellants have vested *exclusively* and irrevocably the right to bring any action to protect such public performance rights, and have disabled themselves from being parties to this proceeding.

VI.

If the three-judge court has jurisdiction as a federal court, this cause must be remanded for further proceedings.

In the court below the appellees moved against the complaint, not only on the ground of want of the requisite jurisdictional amount, but also on the ground that the record did not present a cause within the equitable jurisdiction of a federal court because complainants have a plain, speedy and adequate remedy at law (R. 222-3). The court below specifically deferred decision on this point (R. 272) because it was of the opinion that the record did not present a case within the jurisdiction of the federal court. Without doubt this court, if it finds the requisite jurisdictional amount to exist in this cause, could still sustain the decree of dismissal below, upon the ground that the record does not show a case within the equitable jurisdiction of the federal court. *Spielman Motor Co. v. Dodge*, 295 U. S. 89, 95-7.

This could be done for any one or more of the following reasons:

(a) The individual complainants have an insufficient interest to entitled them presently to the extraordinary relief of injunction. As individual copyright owners, they are exempted from the operation of the Washington Act (see section 3). Moreover, there is no allegation that any of the individual complainants' copyrighted music has ever been, or is being, illegally used in the State of Washington, or has ever been used there at all. So far as appears from the complaint, none of the music of which the Society

owns the public performance rights, may ever have been performed in the State of Washington. The entire $60,000 may have gone to the foreign composers with whom the Society has "working arrangements."

(b) The complainants can adequately interpose a defense to a criminal proceeding brought under section 11 of the Act, and such right of defense is an adequate remedy at law in a case like this.

Spielman Motor Co. v. Dodge, 295 U. S. 89, 96-7.

(c) The defendant deny (R. 223, 262) that they intend to enforce the criminal penalties of the Act until the validity of the Act has been adjudged, and this removes the case from the domain of affirmative equitable relief.

Spielman Motor Co. v. Dodge, 295 U. S. 89, 96-7;
Texas Co. v. Grosjean, 16 F. Supp. 264, 266;
Des Moines v. Des Moines Railway, 214 U. S. 179, 184;
Cincinnati v. Traction Co., 245 U. S. 446, 452-3;
F. C. Henderson v. R. R. Com., 56 F. (2d) 218, 223.

(d) Complainants can interpose their defense in an injunction suit brought by the prosecutor under section 9 of the Act.

Cincinnati v. Traction Co., 245 U. S. 446;
Des Moines v. Des Moines Railway, 214 U. S. 179;
Defiance Water Co. v. Defiance, 191 U. S. 184.

(e) There is no allegation that complainants have not complied and cannot comply, or that they have made any attempt to comply with the statute.

Columbia Building Co. v. Grange; 77 Fed. 798.

But even if this court holds that the court below had jurisdiction as a federal court, and also that it had jurisdiction as a court of equity (although the court below has not yet passed on this point) the cause must in all other particulars be remanded to the court below for further proceedings. That is to say, this court will send the case back to the court below to exercise its judicial discretion with reference to the granting or denial of a temporary injunction. That is a question to be passed upon in the first instance by the court below. *Bordens Company v. Baldwin*, 293 U. S. 194, 213; *Alabama v. U. S.*, 279 U. S. 229, 231; *Wilshire Oil Co. v. U. S.*, 295 U. S. 100, 102; *Ashwander v. Tenn. Valley Authority*, 297 U. S. 288, 347.

As pointed out at the beginning of this brief, the court below based its decision entirely upon the lack of its jurisdiction as a federal court. It did not pass on the merits of the application for the temporary injunction upon consideration of the supporting and opposing affidavits. Until the trial court exercises its judicial discretion in this respect, there is nothing for this court to pass on.

> "It is well-established doctrine that an application for an interlocutory injunction is addressed to the sound discretion of the *trial court*; and that an order either granting or denying

such an injunction will not be disturbed by an appellate court unless the discretion was improvidently exercised." *Alabama v. U. S.*, 279 U. S. 229, 231.

And the trial court, in granting or denying an application for an interlocutory injunction,

"is not bound to decide, upon the allegations of the bill, an important constitutional question, as to which the court * * * is in doubt, in advance of an appropriate determination by the * * * court of the facts of the case to which the challenged statute is sought to be applied." *Wilshire Oil Co. v. U. S.*, 295 U. S. 100, 102-3.

Nor will this court, on the present appeal, pass upon any of the many constitutional questions sought to be raised. *Wilshire Oil Co. v. U. S.*, 295 U. S. 100, 103; *Bordens Company v. Baldwin*, 293 U. S. 194, 212-13; *Ashwander v. Tenn. Valley Authority*, 297 U. S. 288, 347. Before this court will pass on constitutional questions, "the facts essential to their disposition should be definitely found by the lower courts upon adequate evidence." *Bordens Company v. Baldwin*, 293 U. S. 194, 212-13.

If this court remands the case to the court below, with directions to pass on the application for an interlocutory injunction, the court below in granting or denying such application would not have to pass on the constitutionality of the statute, but in the exercise of its judicial discretion could refuse to do so until all of the facts had been fully developed after final trial on the merits. *Wilshire Oil Co. v. U. S.*, 295 U. S. 100, 102; *Allison v. Corson*, 88 Fed. 581; *Magnano*

Co. v. Dunbar, 2 F. Supp. 414; *Pacific Tel. & Tel. Co. v. Tax Comm.*, 180 Wash. 673; *Joplin & Pittsburg Ry. Co. v. Public Service Commission*, 267 Fed. 584, 587.

And if the court below granted or denied an interlocutory injunction, in the exercise of its judicial discretion, without passing on the constitutional questions, but reserving them for trial on the merits, this court would not disturb such a ruling on appeal, because said procedure is within the discretion of the court below. *Ibid.*; *Wilshire Oil Co. v. U. S.*, 295 U. S. 100, 102.

As a matter of fact, in *Gibbs v. Buck*, No. 276 (the companion case here from Florida) the three-judge court below based its brief decision granting an interlocutory injunction upon the ground just above stated, to-wit, that grave questions were involved which the court would not pass on at this time, but that it would grant an interlocuory injunction pending final hearing.

Consequently, for the reasons stated in the cases just mentioned, the three-judge order in *Gibbs v. Buck*, No. 276 (the companion case here) is not reviewable now, except upon the single question whether the court below had jurisdiction as a federal court. Under the decisions just cited it had the power to make the order appealed from without passing upon any of the constitutional questions, and deferring them until final hearing, provided it had jurisdiction as a federal court. If it entered such order without jurisdiction, then it committed an abuse of discretion. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 52; *U. S. v. Corrick*, 298 U. S. 435, 437-8.

Under these well-settled principles, there is nothing to review here in either this case (No. 329) or the Florida case (No. 276) except the question of the jurisdiction of the court below. All of the constitutional questions sought to be raised and argued at length will, under well-settled rules, not be passed on by this court on these appeals. For that reason, we forbear to discuss them here. We merely note parenthetically that the only constitutional questions that are subject to decision in these cases at their ultimate stage fall within principles previously adjudicated by this court.

Allen v. Riley, 203 U. S. 347;
Patterson v. Kentucky, 97 U. S. 501;
John Woods & Sons v. Carl, 203 U. S. 358;
Ozan Lumber Co. v. Union Natl. Bank, 207 U. S. 251;
Carbide Corp. v. American Patents Corp., 283 U. S. 27, 33, foot-note;
Fox Film Corp. v. Doyal, 286 U. S. 123.

See also:

Straus v. American Publishers Ass'n., 231 U. S. 222, 234-5;
State of Washington v. American Society, etc., 13 F. Supp. 141.

CONCLUSION

Appellants advert to the fact that interlocutory injunctions have been granted in several other cases brought by these complainants in other states. Since appellants' brief was written, a statutory three-judge

court in Montana consisting of Haney, Circuit Judge, and Pray and Baldwin, district judges, on December 28, 1938, filed an opinion, dismissing complainants' suit in Montana for want of jurisdiction. The Montana three-judge court, to which application was made for a temporary injunction, summarized the Montana statute, and stated the principal facts which are in all respects similar to those in this case. The Montana three-judge court then continued in its opinion, which is not yet officially reported:

> "The bill was filed by three publishers, seven authors and composers (or their successors), all being the owners of copyrights, and by the president of the Society on behalf of all its members. The bill further alleged that the value of the copyrights owned by each publisher is in excess of $1,000,000; that the right to collect royalties and secure renewals of copyright by each of four authors and composers (complainants) is worth in excess of $100,000; that each of the publishers, and the authors and composers had made assignments to the Society of the right to issue licenses to publicly perform their compositions for profit; that the Society had issued about 208 licenses in Montana which were in force, and from which the Society received $17,709.55 in 1937; that 'the cost of even attempting to' file the required list would be far in excess of $50,000; that each of the publishers, for the year 1936 had received from the Society in excess of $50,000, that each of the authors and composers (complainants) had received from the Society for 1936 in excess

of $5,000, and that the publishers and the authors and composers will be entitled to receive a similar sum for each year to January 1, 1940, if their rights are not interfered with and destroyed by the statute. There was also a general allegation that the amount in controversy exceeded $3,000, exclusive of interest and costs. Other allegations regarding the impracticability and impossibility of complying with the statute, and the harm resulting from compliance, need not here be related.

"The suit was brought against the State Treasurer, State Auditor, Secretary of State of Montana, two prosecuting attorneys of that state and two unknown defendants. The named defendants filed elaborate motions to dismiss. One ground was that the amount in controversy does not exceed $3,000 exclusive of interest and costs.

"The proof of complainants is confined to the value of the copyrights owned, and the cost of preparing the list required by the statute. There is no proof of value of the right to carry on the business free of the Montana regulations, nor is there proof of the amount of the loss which will occur if the statute is complied with. There is no showing that the cost of compliance will not be returned in greater income. We think, as was held in a similar case, *Buck et al., v. Case, et al.*, (W. D. Wash.) 24 F. S. 541, that there is no showing that the requisite jurisdictional amount is involved. *Healy v. Ratta*, 292 U. S. 263, 267; *McNutt v. General Motors, etc., Corp.*, 298 U. S.

178, 181; *KVOS, Inc., v. Associated Press*, 299 U. S. 269, 277.

"Defendants may present an order of dismissal, based on the above-mentioned ground."

The foregoing decision follows that of the court below in the present case.

We respectfully submit that the decision of the lower court should be affirmed, upon the ground that it did not have jurisdiction as a federal court, or, in any event, as a court of equity; that if both of these positions be held erroneous, the cause be remanded to the court below for further proceedings.

Respectfuily submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 329.—October Term, 1939.

Gene Buck, Individually and as President of the American Society of Composers, Authors and Publishers, et al., Appellants, vs. Phil H. Gallagher, Individually and as State Treasurer of the State of Washington, et al.	On Appeal from the District Court of the United States for the Western District of Washington.

[April 17, 1939.]

Mr. Justice Reed delivered the opinion of the Court.

This is an appeal, under section 266 of the Judicial Code, from a decree dismissing appellants' bill to enjoin the enforcement by the appellees of a statute of the State of Washington.[1] The purpose of the statute is to render illegal certain activities carried on by pools of copyright owners in authorizing by blanket licenses the performance of their musical compositions.

The statute declares it unlawful for two or more persons holding separate copyrighted works to pool their interests in order to fix prices for their use, to collect fees or to issue blanket licenses for their commercial production. Joint undertakings for this purpose are permitted if the licenses are issued at rates assessed on a per piece system of usage. All combinations of owners of separate copyrighted musical works are required to file a complete list of these works once each year with the secretary of state of the State of Washington, together with detailed information as to prices and ownership. There are numerous other provisions unnecessary to detail.

The appellants are the American Society of Composers, Authors and Publishers; Gene Buck, suing in his own name and as the president of the Society; and a number of other members, corporate publishers and authors, composers or their next of kin. This suit was brought by complainants on behalf of themselves and others simi-

[1] Buck v. Case, 24 F. Supp. 541. Washington Laws 1937, c. 218, p. 1070.

larly situated, members of the Society too numerous to make it practicable to join them as plaintiffs in a matter of common and general interest. The bill alleges the organization of the Society as a voluntary, unincorporated, non-profit association under the laws of New York, and sets out that its purpose is to protect the owners of copyrighted musical works against piracies, to grant licenses and to collect royalties for the public performance for profit of the compositions of its members. These are composers, authors and publishers of musical compositions or their successors. The royalties and license fees collected by the Society are distributed from time to time, as ordered by the Board of Directors, among the members of the Society, after the payment of expenses of operation and sums due to foreign affiliated societies and after the deduction of a limited reserve fund.

In addition to the general allegation that the value of the matter in dispute is in excess of $3,000, the bill alleges that the value of each publisher's copyrights exceeds $1,000,000. The bill further shows that each individual complainant has rights to royalties and renewals worth in excess of $100,000. It is shown by the bill that in the State of Washington there were five hundred twenty-eight contracts outstanding in 1936, all entered into in the name of the Society, from which it received more than $60,000 and that similar sums annually will be collected. Other allegations are discussed later.

On the filing of the bill, a motion was made for an interlocutory injunction and affidavits were filed in support of the request. At the time the motion for a temporary injunction came on for hearing, the defendant state officers and certain intervenors filed motions to dismiss which challenged the bill on various grounds. The district court considered only one ground: whether the value of the subject matter in dispute is more than $3,000, exclusive of interest and costs. Upon the hearing, the district court found that neither the bill nor the record shows the necessary jurisdictional value and dismissed the bill. The basis for this ruling is treated here.

Although this statute of Washington, as that of Florida,[2] is aimed at the power exercised by combinations of copyright owners over the use of musical compositions for profit, the differences between the enactments and the procedural situations require additional consideration. The Florida statute does not permit

[2] Considered in Gibbs *v.* Buck, No. 276, October Term, 1938, decided today.

any combination of copyright owners for the purpose of licensing the use of their compositions. The prohibition is complete. In the Washington statute, on the other hand, such a combination, federation or pool is not prohibited if it issues licenses "on rates assessed on a per piece system of usage." Even upon these permitted transactions there are limitations of price and use, unnecessary to consider here.[3] The statute is directed particularly at the practice of issuing blanket licenses which authorize the performance of all copyrighted material belonging to the licensor. Whether a state statute is regulatory or prohibitory, when a bill is filed against its enforcement under section 266 of the Judicial Code, the matter in controversy is the right to carry on business free of the regulation or prohibition of the statute.[4] Where the statute is regulatory the value of the right to carry on the business, as was said in *McNutt* v. *General Motors Acceptance Corporation*, may be shown by evidence of the loss that would follow the enforcement of the statute. And this loss may be something other than the difference between the net profit free of regulation and the net profit subject to regulation. The difficulties of determining the value of rights by calculating past profits as compared with possible future profits, influenced by the single factor of statutory regulation, are obvious. This difference is not the only test of the value of the right in

[3] Washington Laws, 1937, sec. 3, c. 218, p. 1071, reads as follows: "It shall be unlawful for two or more persons holding or claiming separate copyrighted works under the copyright laws of the United States, either within or without the state, to band together, or to pool their interest for the purpose of fixing the prices on the use of said copyrighted works, or to pool their separate interests or to conspire, federate, or join together, for the purpose of collecting fees in this state, or to issue blanket licenses in this state, for the right to commercially use or perform publicly their separate copyrighted works: *Provided, however,* Such persons may join together if they issue licenses on rates assessed on a per piece system of usage; *Provided, further,* This act shall not apply to any one individual author or composer or copyright holder or owner who may demand any price or fee he or she may choose for the right to use or publicly perform his or her individual copyrighted work or works: *Provided, further,* Such per piece system of licensing must not be in excess of any per piece system in operation in other states where any group or persons affected by this act does business, and all groups and persons affected by this act, are prohibited from discriminating against the citizens of this state by charging higher and more inequitable rates per piece for music licenses in this state than in other states: *Provided, further,* Where the owner, holder or person having control of any copyrighted work has sold the right to the single use of said copyrighted work, where its sole value is in its use for public performance for profit, and has received any consideration therefor, either within or without the state, then said person or persons shall be deemed to have sold and parted with the right to further restrict the use of said copyrighted work or works."

[4] Prohibitory statutes—Gibbs v. Buck, *supra;* regulatory statutes—McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 181; Kroger Grocery Co. v. Lutz, 299 U. S. 300, 301.

question. The value of the matter in controversy may be at least as accurately shown by proving the additional cost of complying with the regulation. This factor was not offered in evidence in the *McNutt* case.

In *Packard* v. *Banton*[5] the existence of the jurisdictional amount was partly determined by consideration of the cost of providing liability insurance required by a regulatory statute. Where a state railroad commission required the construction and service of an industrial spur which did not increase earning capacity, the cost was held to measure the jurisdictional amount.[6] The expense of producing the information required by a challenged order in a utility investigation was considered sufficient to establish the value of the matter in controversy.[7] The cost of complying with the challenged statute as a test of the value of the amount in controversy has been applied in effect in suits to enjoin the collection of taxes as unconstitutional interferences with the right to do business. In such cases "the sum due or demanded is the matter in controversy and the amount of the tax, not its capitalized value, is the measure of the jurisdictional amount."[8]

By section four of the Washington statute every combination of two or more copyright owners must file, once a year, with the secretary of state, a complete list of their copyrighted works, under oath.[9] By section three, individuals are forbidden from joining together "for the purpose of collecting fees in this state" unless their licenses are on a per piece system of rates. In addition to the general allegation that the value of the matter in controversy exceeds $3,000, the bill alleges the cost of compliance by the Society, the combination of members, with section four would exceed $300,000.[10] For the individual members who now have the benefits of

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[5] 264 U. S. 140.

[6] Western & A. R. R. v. Comm'n, 261 U. S. 264, 267.

[7] Petroleum Exploration, Inc. v. Comm'n, 304 U. S. 209, 215.

[8] Healy v. Ratta, 292 U. S. 263, 271, and cases there cited; Grosjean v. Am. Press Co., 297 U. S. 233, 241; Henneford v. No. Pacific Ry., 303 U. S. 17, 19.

[9] The list must state that it "is a complete catalogue of the titles of their claimed compositions, whether musical or dramatic or of any other classification, and in addition to stating the name and title of the copyrighted work it shall recite therein the date each separate work was copyrighted, and the name of the author, the date of its assignment, if any, or the date of the assignment of any interest therein, if any, and the name of the publisher, the name of the present owner, together with the addresses and residences of all parties who have at any time had any interest in such copyrighted work."

[10] Specifically the allegation is that "The cost to the Society of attempting to compile the lists and information required to be furnished under the State

the services performed by the Society, additional allegations set out the cost imposed upon them by the statutory regulation as being "in excess of $10,000" to each for carrying on for themselves the functions now performed for them by the Society. The motions to dismiss deny the general allegation of value, deny that there would be any cost to the Society by compliance with section four as the required list is already compiled and the expense, since the Society is non-profit, would be borne by members, and deny that the individual complainants would be put to a cost of $10,000 each. There was no allegation of the loss or cost to the Society or members occasioned by the requirement that the licenses from pooled copyrights should be issued at per piece rates.

On submission of the motion to dismiss for want of the jurisdictional value, the burden of proof was upon complainants.[11] Although the trial court called specific attention to the jurisdictional matters three months before it filed its opinion denying jurisdiction, by request for additional briefs, no evidence was offered. After the filing of the opinion and before the entry of the decree, on complainants' motion an order was entered to show cause why witnesses should not be heard on the value of the matter in controversy. The complainants furnished an uncontroverted affidavit stating that their failure to offer evidence was due to the fact that there was no denial of the facts pleaded. The offer of proof showed that it was desired "to offer the testimony of expert witnesses concerning the cost of complying with the requirements of Section 4 of the Act, and concerning the value of the property rights in question which will be affected by this Statute." The court did not reject the evidence as a matter of discretion because tardily presented. On the hearing on the rule the court made it quite clear that the proffered evidence was deemed immaterial because it showed only cost of compliance, not the value of the right to do business

Statute would be far in excess of $300,000; which sum would have to be expended for research work with reference to the past history of each and every copyright owner, by every one of the 44,000 members of the Society and its affiliated societies, lawyers fees for opinions as to the rights of parties involved with respect to the ownership, grants, licenses and other interests in the respective copyrights, clerical help and other incidental expenses; even with such an expenditure, it would be utterly impossible to furnish an accurate or complete list of all the respective copyrights of the members of the Society and of its affiliated societies with all of the data required by the State Statute."

[11] McNutt v. General Motors Acceptance Corp., 298 U. S. 178; 189.

free of the compulsion of the statute.[12] The application to take further testimony was denied and the motion to dismiss granted "in that this cause is not within the jurisdiction of this court as a federal court." We conclude that the refusal to permit additional evidence in these circumstances was error.

The complainants in this case are the same as those in *Gibbs* v. *Buck, supra.* In the *Gibbs* case we pointed out that the members share directly in the earnings of the Society and have a common and undivided interest in the right to license in association through the Society free of the provisions of the state statute. The allegations as to relationship between the Society and its members show the same status in this case. The fact that "neither practice nor rule of the committee concerning the apportioning among the Society's members of the pooled license fees realized is shown,"[13] does not affect the rights members have in the apportionment of the royalties from license fees. These rights are granted by the articles of association which are a part of the bill. *KVOS, Inc.* v. *Associated Press,*[14] relied upon below, is distinguished in the *Gibbs* case.

The cause will be remanded to the District Court with directions to permit the introduction of evidence and for further proceedings not inconsistent herewith.

Reversed.

Mr. Justice BLACK dissents.

Mr. Justice FRANKFURTER took no part in the consideration or decision of this case.

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[12] R., p., this statement was made by the court: "Perhaps we are somewhat in the fog with respect to the matter you are trying to present but from our viewpoint it seems to us that you are urging that the value of the thing in controversy is to be measured by the cost of doing business or complying with the statute. From our standpoint we think the cost of doing business has nothing to do with the method of doing business. It is true the statute may necessitate a large expenditure but that would not mean anything because by a large expenditure you might make a much larger profit. Perhaps we don't understand each other but I think that is the basis of measuring the value of the matter in controversy."

[13] Buck v. Case, 24 F. Supp. 541, 549.

[14] 299 U. S. 269.